LEXSEE

**HRL LAND OR SEA YACHTS, Plaintiff, -v- TRAVEL SUPREME, INC., SPARTAN MOTOR CHASSIS, INC., TERRY TOWN TRAVEL CENTER, INC., Defendants.**

**Case No. 1:07-cv-945**

**UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION**

**2009 U.S. Dist. LEXIS 13162**

**February 20, 2009, Decided**
**February 20, 2009, Filed**

**PRIOR HISTORY:** HRL Land Or Sea Yachts v. Travel Supreme, Inc., 2009 U.S. Dist. LEXIS 3615 (W.D. Mich., Jan. 16, 2009)

**COUNSEL:** [*1] For HRL Land or Sea Yachts LLC, a Montana limited liability company, plaintiff: Karl Heil, Mark P. Romano, LEAD ATTORNEYS, Romano Stancroff & Mikhov PLLC, Farmington Hills, MI.

For Terry Town Travel Center, Inc., a Michigan corporation, jointly and severally, defendant: Paul A. McCarthy, Stephen Jay Hulst, Rhoades McKee PC, Grand Rapids, MI.

**JUDGES:** HONORABLE PAUL L. MALONEY, Chief United States District Judge.

**OPINION BY:** PAUL L. MALONEY

**OPINION**

OPINION AND ORDER GRANTING DEFENDANT TERRY TOWN TRAVEL CENTER'S MOTION FOR SUMMARY JUDGMENT

This matter comes before the Court on a motion (Dkt. No. 58) for summary judgment by Defendant Terry Town Travel Center (Terry Town). Plaintiff HRL Land or Sea Yachts (Plaintiff or HRL) filed a response. (Dkt. No. 63.) Defendant Terry Town filed a reply. (Dkt. No. 66.) Having read the motion, briefs, exhibits and relevant authority, the Court finds no need for oral argument to resolve the disputed issues. *See* W.D. MICH. L.CIV.R. 7.2(d).

I. BACKGROUND

Plaintiff HRL is a Montana limited liability company. [1] Defendant Travel Supreme, an Indiana corporation, manufactured recreational vehicles (RVs). [2] (Compl. P 2.) Defendant Spartan Motors, a Michigan corporation, makes chassis which were [*2] used in some of Defendant Travel Supreme's RVs. (*Id.* P 3.) Defendant Terry Town, a Michigan corporation, sells motor homes and other RVs. (*Id.* P 4.)

1 The LLC was formed for the purpose of purchasing the motor home and saving taxes on the purchase price. (Plaintiff's Response Brief at 3.) The propriety of such an entity and whether Defendant Terry Town suggested Plaintiff form such entity are not at issue here and does not impact the motion.

2 Based on earlier motions involving Defendant Travel Supreme, it appears the entity is no longer in business.

In 2006, Rhonda and Henry Leonard decided to purchase a motor home or recreational vehicle (RV). (Rhonda Leonard Deposition at 1 - Exhibit 1 to Defendant Terry Town's Brief in Support.) The Leonards found the floor plan for a Travel Supreme Envoy (Envoy), a type of RV, on Defendant Terry Town and Defendant Travel Supreme's websites. (*Id.* at 13-15.) The Leonards decided to purchase an Envoy. On July 8, 2006, Defendant Terry Town faxed a purchase agreement to Rhonda Leonard. (*Id.* at 19-20; Purchase Agreement dated 7-8-08 - Exhibit 2 to Defendant Terry Town's Brief.) On August 9, 2006, Defendant Terry Town sold a 2006 Envoy to Plaintiff. (Compl. [*3] P 5.) Ms. Leonard, as an agent of Plaintiff, signed a purchase agreement for the Envoy on that date. (Defendant Terry Town's Exhibit 5.) The Envoy was manufactured by Defendant Travel Supreme and included a chassis

manufactured by Defendant Spartan Motors. (Compl. P 5.)

The purchase agreement sent to Ms. Leonard in July and the purchase agreement signed by Ms. Leonard on behalf of Plaintiff in August contain a number of conditions. The front of the form, near the bottom and above the signature lines, contains the following statement.

> **THE REVERSE SIDE** of this agreement contains **ADDITIONAL TERMS AND CONDITIONS,** including, but not limited to, provisions regarding **WARRANTY, EXCLUSIONS AND LIMITATIONS OF DAMAGES.**

(Defendant Terry Town's Exhibits 2 and 5.) The reverse side of the purchase agreement contained a paragraph titled "**WARRANTIES AND EXCLUSIONS.**" (*Id.*) That paragraph states

> BUYER UNDERSTANDS THAT THERE MAY BE WRITTEN WARRANTIES COVERING THE UNIT PURCHASED, OR ANY COMPONENTS, OR ANY APPLIANCE(S) WHICH HAVE BEEN PROVIDED BY THE MANUFACTURERS. DEALER HAS GIVEN BUYER AND BUYER HAS READ AND UNDERSTOOD A STATEMENT OF THE TYPE OF WARRANTY COVERING THE UNIT PURCHASED AND/OR COMPONENT(S) AND/OR [*4] APPLIANCES BEFORE BUYER SIGNED THIS SALES AGREEMENT. THERE IS NO EXPRESS WARRANTY ON USED UNITS, EXCEPT WHERE PROHIBITED BY LAW: (i) DELIVERY BY DEALER TO BUYER OF WARRANTY BY THE MANUFACTURER(S), (ii) BUYER ACKNOWLEDGES THAT THESE EXPRESS WARRANTIES MADE BY THE MANUFACTURER(S) HAVE NOT BEEN MADE BY THE DEALER EVEN IF THEY SAY DEALER MADE THEM OR SAY DEALER MADE SOME OTHER EXPRESS WARRANTY, AND (iii) DEALER IS NOT AN AGENT OF THE MANUFACTURER(S) FOR WARRANTY PURPOSES EVEN IF DEALER COMPLETES, OR ATTEMPTS TO COMPLETE REPAIRS FOR THE MANUFACTURER(S). EXCEPT IN WV, MS, WI OR WHERE OTHERWISE PROHIBITED BY LAW: (i) BUYER UNDERSTANDS THAT THE IMPLIED WARRANTIES OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE AND ALL OTHER WARRANTIES EXPRESSED OR IMPLIED ARE EXCLUDED BY DEALER FROM THIS TRANSACTION AND SHALL NOT APPLY TO THE UNIT OR ANY COMPONENT OR ANY APPLIANCE CONTAINED THEREIN, (ii) BUYER UNDERSTANDS THAT DEALER MAKES NO WARRANTIES WHATSOEVER REGARDING THIS UNIT OR ANY COMPONENT OR ANY APPLIANCE CONTAINED THEREIN, AND (iii) BUYER UNDERSTANDS THAT DEALER DISCLAIMS AND EXCLUDES FROM THIS TRANSACTION ALL WARRANTY OBLIGATIONS WHICH EXCEED OR EXIST OVER AND ABOVE THE LEGAL WARRANTIES [*5] REQUIRED BY APPLICABLE STATE LAW.

(*Id.* P 10.) The following paragraph is titled "**LIMITATION OF DAMAGES**" and states the following.

> EXCEPT IN WV AND ANY OTHER STATE WHICH DOES NOT ALLOW THE LIMITATION OF INCIDENTAL AND/OR CONSEQUENTIAL DAMAGES THE FOLLOWING LIMITATION OF DAMAGES SHALL APPLY IF ANY WARRANTY FAILS BECAUSE OF ATTEMPTS TO REPAIR ARE NOT COMPLETED WITHIN A REASONABLE TIME OR ANY REASON ATTRIBUTED TO THE MANUFACTURER, INCLUDING MANUFACTURERS WHO HAVE GONE OUT OF BUSINESS. BUYER AGREES THAT IF BUYER IS ENTITLED TO ANY DAMAGES AGAINST DEALER, BUYER DAMAGES ARE LIMITED TO THE LESSER OF EITHER THE COST OF NEEDED REPAIRS OR REDUCTION IN THE MARKET VALUE OF THE

> UNIT CAUSED BY THE LACK OF REPAIRS. BUYER ALSO AGREES THAT ONCE BUYER HAS ACCEPTED THE UNIT, EVEN THOUGH THE MANUFACTURER(S)' WARRANTY DOES NOT ACCOMPLISH ITS PURPOSE, THAT BUYER CANNOT RETURN THE UNIT TO DEALER AND SEEK A REFUND FOR ANY PURPOSE.

(*Id.* P 11.)

Plaintiff obtained several warranties on parts of the Envoy at the time of purchase. Ms. Leonard, as an agent for Plaintiff, signed a document indicating Plaintiff purchased a "platinum protection program" for $ 1,157.79 covering the exterior paint and the interior carpeting [*6] and upholstery. (Plaintiff's Exhibit 6.) Plaintiff purchased road hazard coverage. (Plaintiff's Exhibit 7.) Defendant Terry Town extended coverage to Plaintiff for "two years of pro rating on the batteries." (Defendant Terry Town's Exhibit 5.)

The RV suffered a number of problems in the limited time Plaintiff possessed it, some of which were fixed or repaired by Defendant Terry Town. In the ten months between August 2006 and May 2007, Plaintiff was able to use the RV for only three months. (Plaintiff's Exhibit 10 - Letter to Defendant Travel Supreme dated 5/14/2007.) Plaintiff demanded the RV be repaired or the sales price refunded. (*Id.*) Defendant Terry Town refused to accept the return of the Envoy and refused to refund any part of the purchase price. (Compl. P 33.)

## II. LEGAL FRAMEWORK

Summary judgment is appropriate only if the pleadings, depositions, answers to interrogatories and admissions together with the affidavits show there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law. FED. R. CIV. P. 56(c); *Tucker v. Tennessee,* 539 F.3d 526, 531 (6th Cir. 2008). The burden is on the moving party to show that no genuine issue of [*7] material fact exists, but that burden may be discharged by pointing out the absence of evidence to support the nonmoving party's case. *Bennett v City of Eastpointe,* 410 F.3d 810, 817 (6th Cir. 2005) (quoting *Celotex Corp. v. Catrett,* 477 U.S. 317, 325, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)). The facts, and the inferences drawn from them, must be viewed in a light most favorable to the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986) (quoting *Matsushita Elec. Indust. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986)). Once the moving party has carried its burden, the nonmoving party must set forth specific facts showing there is a genuine issue for trial. FED. R. CIV. P. 56(e); *Matsushita,* 475 U.S. at 574. The question is "whether the evidence presents a sufficient disagreement to require submission to the jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson,* 477 U.S. at 251-252.

## III. ANALYSIS

### A. COUNTS II AND III - Breach of Written and Implied Warranties under the Michigan Commercial Code and Magnuson-Moss Warranty Act

#### 1. Express Warranties Issued by Manufacturers

Plaintiff alleges Defendants Travel Supreme and Spartan provided express warranties pertaining [*8] to the 2006 Envoy. (Compl. P 21.) Plaintiff alleges Defendant Terry Town, as an authorized dealer and agent of Defendants Travel Supreme and Spartan, breached the express warranties by failing to repair various defects in the mobile home. (Compl. PP 22-23.) Defendant Terry Town asserts it has not provided any written or express warranties to Plaintiff which would cover the defects alleged in the complaint. Defendant Terry Town further asserts the conspicuous disclaimer in the purchase agreement states it does not adopt any of the manufacturers' express warranties.

The disclaimer in the purchase agreement clearly and explicitly states that Defendant Terry Town, as the dealer, does not adopt or extend any of the manufacturers' warranties on the unit purchased, its components, or any appliances. (Purchase Agreement P 10.) The disclaimer expressly states the dealer is not an agent of the manufacturer, even if the dealer repairs or attempts to repair defects for the manufacturer. (*Id.*) When a dealer provides the buyer with copies of the manufacturer's warranties, but does not adopt the warranties, the dealer has not made an express warranty on the good. *Ducharme v. A&S RV Center, Inc.*, 321 F.Supp.2d 843, 854 (E.D. Mich. 2004) [*9] (Cohn, J.). Unless Plaintiff establishes some basis why that disclaimer is not valid, Defendant Terry Town cannot be held liable for breach of the manufacturers' written warranties.

#### 2. Implied Warranties - Michigan Commercial Code

Michigan law extends two implied warranties when goods are sold by a merchant: (1) an implied warranty of merchantability, MCL § 440.2314; and (2) an implied warranty of fitness for a particular purpose, MCL § 440.2315. The merchant may, however, disclaim those implied warranties through a conspicuous disclaimer. MCL § 440.2316(2) [3]; *Pidcock v. Ewing,* 371 F. Supp. 2d

870, 880 (E.D. Mich. 2005) (Cohn, J.); *Parsley v. Monaco Coach Corp.*, 327 F.Supp.2d 797, 800 (W.D. Mich. 2004) (Bell, C.J.). Under Michigan law, a term is conspicuous "when it is so written that a reasonable person against whom it is to operate ought to have noticed it." *Id.* (quoting MCL § 440.1201(10)). *See Lumber Mutual Ins. Co. v. Clarklift of Detroit, Inc.*, 224 Mich. App. 737, 569 N.W.2d 681, 683 (Mich. App. 1997) (per curiam) ("the primary focus is whether a reasonable person ought to have noticed [the warranty disclaimer], taking into account the guideline language of § 1-201(b)(10), as well as any other circumstances [*10] that protect the buyer from surprise"). Whether a term is conspicuous is a decision for the court. *Parsley*, 327 F.Supp.2d at 808 (citing MCL § 440.1201(10)). The statutory definition of "conspicuous" explains that a printed heading in capitals is conspicuous and language in the body of a form is conspicuous if it is larger or in contrasting type or color. *Id.* (citing MCL § 440.1201(10)).

3 Subsection (2) of the statute provides

> (2) Subject to subsection (3), to exclude or modify the implied warranty of merchantability or any part of it the language must mention merchantability and in case of a writing must be conspicuous, and to exclude or modify any implied warranty of fitness for a particular purpose the exclusion must be by a writing and must be conspicuous. Language to exclude all implied warranties of fitness is sufficient if it states, for example, that "There are no warranties which extend beyond the description of the face hereof."
>
> MCL 440.2316(2).

A reasonable person ought to have noticed Defendant Terry Town's disclaimer. The front side of the purchase agreement, in all capital letters and bold type face, both of which are distinct from the surrounding type, informs the person [*11] about to sign the document that additional terms relevant to the warranty, including exclusions and limitations, are on the reverse side. The notice on the front of the document here is similar to the language upheld as a conspicuous disclaimer in *Parsley* and *Pidcock*. The disclaimer on the back side of the form is similarly conspicuous. Paragraphs 10 and 11 on the back side of the form are labeled respectively "Warranties and Exclusions" and "Limitation of Damages." The labels are in all capital letters, in larger type than the surrounding terms, and are underlined. In contrast to the text of the other 12 paragraphs on the back side, the text for both paragraphs 10 and 11 are completely capitalized. The disclaimer and limitation on the back side is similar to the disclaimer on the back side of the form in *Parsley*.

Plaintiff cannot claim to have been surprised by the terms of the purchase agreement. [4] Defendant Terry Town faxed Ms. Leonard a copy of the purchase agreement several weeks before Plaintiff made the purchase. In addition, in Michigan, a party who signs a document is deemed to know the contents of those documents and may not claim ignorance to avoid enforcement of the instrument. [*12] *Scholz v. Montgomery Ward & Co. Inc.*, 437 Mich. 83, 468 N.W.2d 845, 848 (Mich. 1991). *See Montgomery v. Fidelity & Guaranty Life Ins. Co.*, 269 Mich. App. 126, 713 N.W.2d 801, 804 (Mich. App. 2005) ("It is well established that failure to read an agreement is not a valid defense of enforcement of a contract. A contracting party has a duty to examine a contract and know what the party has signed, and the other contracting party cannot be made to suffer for neglect of that duty." (citations omitted)). A party who does not understand the terms of a contract has a duty to inquire about its contents. *Scholz*, 468 N.W.2d at 848.

4 Elsewhere Plaintiff argues there is a genuine issue of material fact whether the document signed by Ms. Leonard actually contained two sides. Plaintiff bases this claim on the bates stamp numbers for the two pages of Defendant's Exhibit 5. When the page signed by a party explicitly incorporates the standards and conditions of sale located elsewhere, those standards and conditions become part of the contract. *Martin and Haddie Rasche Corp. v. Int'l Metals and Chemicals Group*, No. 199018, 1997 Mich. App. LEXIS 2276, 1997 WL 33331016 (Mich. App. Nov. 21, 1997) (per curiam) (involving a two sided form where the document signed by [*13] the plaintiff did not have a second side because the document had been faxed, the court held the contract included the terms on the missing reverse side based on the incorporation language on the front side of the form). *See Polimeni v. General Motors Corp.*, No. 274419, 2007 Mich. App. LEXIS 1640, 2007 WL 1791894 (Mich. App. June 21, 2007) (per curiam) (rejecting the plaintiff's argument that he never saw or read the terms on the back side of a purchase order form because he was put on notice of those terms through the language on the front side of the form).

Plaintiff's authority on conspicuousness is easily distinguished. Plaintiff cites *Krump PM Engineering, Inc. v. Honeywell*, 209 Mich. App. 104, 530 N.W.2d 146 (Mich. App. 1995), *Latimer v. William Mueller & Son,*

*Inc.*, 149 Mich. App. 620, 386 N.W.2d 618 (Mich. App. 1986) and *Mallory v. Conida Warehouses, Inc.*, 134 Mich. App. 28, 350 N.W.2d 825 (Mich. App. 1984) (per curiam). *Mallory* involved an attempted warranty disclaimer found on one of three tags attached to a bag of seeds. *Id.* at 827. The court found, among other things, the tags were attached to the bottom of the seed bag, the warranty tag was the least conspicuous writing on the bag, and the heading on the tag was "warranty" which suggested that additional warranties [*14] were included rather than excluded. *Id. Latimer* also involved a disclaimer on tags attached to a bag of seeds. 386 N.W.2d at 620. The court, like the court in *Mallory,* found the disclaimer on the warranty tag was not conspicuous. *Id.* at 625. Although the word "warranty" was in capital letters, the balance of the language where the disclaimer was located was in standard type, there was no contrasting color or other emphasis on any portion of the tag and the tag was attached to the bag along with two other tags. *Id.* The court also noted the heading "warranty" suggested that warranties were included rather than excluded because the disclaiming language on the tax was the least conspicuous writing attached to the bag. *Id. Krump* involved a disclaimer located on a customer service invoice for parts. 530 N.W.2d at 148. The court found the language of the warranty was not conspicuous. *Id.* at 149. The form at issue was two sided. *Id.* The reference to the warranty on the front of the form was in small print. *Id.* A portion of the disclaimer on the back of the form was in all capital letters, but the limitation on damages was not in capital letters. *Id.*

The disclaimer can be enforced against Plaintiff [*15] even though no one from Defendant Terry Town signed the purchase agreement. Plaintiff argues the disclaimer cannot be enforced because Defendant Terry Town never signed the purchase agreement. Plaintiff points out the language of the purchase agreement, under the line for the dealer's signature, states "not valid unless signed and accepted by an officer or authorized agent of the company." (Purchase Agreement.) Michigan law requires contracts for the sale of goods be signed by the party against whom enforcement is sought. MCL § 440.2201(1). The notes to the statute clarify that the word "signed" references "any authentication which identifies the party to be charged." *Id.* The notes further indicate "receipt and acceptance of either the goods or the price constitutes an unambiguous overt admission by both parties that a contract actually exists." *Id.* There is no genuine issue of material fact that Defendant Terry Town delivered the motor home to Plaintiff and that Plaintiff accepted the motor home from Defendant. Under those circumstances, the lack of a signature on the purchase agreement does not render the disclaimer in the purchase agreement ineffecive and unenforceable. *See Rokicsak v. Colony Marine Sales and Serv.*, 219 F.Supp.2d 810, 815 (E.D. Mich. 2002) [*16] (Steeh, J.) (involving the sale of a boat where the purchase agreement was not signed by the dealer but the boat was delivered by the dealer, payment was accepted and the buyer accepted the boat).

3. Implied Warranties - Magnuson-Moss Warranty Act (MMWA)

The MMWA creates federal jurisdiction over claims for breach of written and implied warranties of consumer products. *See Harnden v. Jayco, Inc.*, 496 F.3d 579, 581 (6th Cir. 2007) (involving a suit over the sale of an RV, the court held "the MMWA provides for federal jurisdiction over certain claims," citing 15 U.S.C. § 2310(d)(1)(B)). The MMWA provides, in part, "a consumer who is damaged by the failure of a supplier, warrantor, or service contractor to comply with any obligation under this chapter, or under written warranty, implied warranty, or service contract, may bring suit for damages and other legal and equitable relief." 15 U.S.C. § 2310(d)(1). The implied warranty arises under State law as the result of a sale by a supplier of a consumer product. 15 U.S.C. § 2301(7). In other words, an MMWA claim for breach of an implied warranty depends on the plaintiff having a valid state law implied warranty claim. *Harnden v. Ford Motor Co.*, 408 F.Supp.2d 300, 308 (E.D. Mich. 2004) [*17] (Edmunds, J.). Accordingly, unless Plaintiff establishes it has some implied warranty on a consumer product by Defendant Terry Town, Plaintiff cannot maintain its claim under the MMWA.

Plaintiff's authority on this point does not compel a different answer. Plaintiff cites *Pearson & Son Excavating Co, Inc. v. Western Recreational Vehicles, Inc.*, No. 03-40246, 2007 U.S. Dist. LEXIS 98209, 2007 WL 836603 (E.D. Mich. Mar. 14, 2007) (Gadola, J.) and *Milicevic v. Fletcher Jones Imports, Ltd.*, 402 F.3d 912 (9th Cir. 2005). In *Pearson,* Judge Gadola had earlier remanded the portion of the action dealing with the plaintiff's state law claims, but kept the MMWA claims for breach of written and implied warranties. 2007 U.S. Dist. LEXIS 98209, 2007 WL 836603 * 1. Ruling on the defendant's first motion for summary judgment, Judge Gadola granted the motion with regard to the claim for breach of a written warranty, but denied the motion with regard to the claim for breach of an implied warranty. *Id.* The defendant filed a renewed motion for summary judgment, this time questioning the plaintiff's ability to bring an action under the MMWA without an underlying state claim. *Id.* Judge Gadola denied the motion, holding the MMWA provides an independent cause of [*18] action for breach of an implied warranty, citing section 15 U.S.C. § 2310(d)(1). 2007 U.S. Dist. LEXIS 98209, [WL] * 1-2. As Judge Gadola carefully explained, "to be

sure, a plaintiff's implied warranty claim brought under the Magnuson-Moss Warranty Act rests on the applicable state law, a Magnuson-Moss implied warranty claim is only successful if the plaintiff would be able to assert a valid implied warranty claim under state law." 2007 U.S. Dist. LEXIS 98209, [WL] * 2. As explained under the previous section, Plaintiff does not have a valid implied warranty claim under Michigan law because Defendant Terry Town disclaimed any implied warranty. Plaintiff fares no better under the holding in *Milicevic*. The Ninth Circuit simply held the Magnuson-Moss Warranty Act creates a private cause of action for a warrantor's failure to comply with the terms of a written warranty, citing 15 U.S.C. § 2310(d)(1)(B). 402 F.3d at 917. Plaintiff cannot, however, establish Defendant breached any written warranty.

The Magnuson-Moss Warranty Act (MMWA) does limit the ability of a supplier to disclaim or modify any implied warranties to a consumer. The MMWA provides

> (a) Restrictions on disclaimers or modifications
>
> No supplier may disclaim or modify (except as provided [*19] in subsection (b) of this section) any implied warranty to a consumer with respect to such consumer product if (1) the supplier makes a written warranty to the consumer with respect to such consumer product, or (2) at the time of sale, or within 90 days thereafter, such supplier enters into a service contract with the consumer which applies to such consumer product.
>
> ***
>
> (c) Effectiveness of disclaimers, modifications, or limitations
>
> A disclaimer, modification, or limitation made in violation of this section shall be ineffective for purposes of this chapter and State law.

15 U.S.C. § 2308. This section of the MMWA supplements state-law implied warranties by prohibiting their disclaimer by the supplier when the supplier makes a written warranty or enters into a service contract. *Parsley*, 327 F.Supp.2d at 805; *Rokicsak*, 219 F.Supp.2d at 817. If Plaintiff establishes Defendant Terry Town made an express warranty, Plaintiff may maintain an action for breach of an implied warranty under the MMWA because, under the MMWA, Defendant Terry Town would be prohibited from disclaiming the implied warranty. *Id.* However, the MMWA does not revive Plaintiff's state law claims for breach of implied warranty, [*20] it merely provides a federal cause of action when a supplier disclaims an implied warranty while making either a written warranty or entering into a service contract. *Id.*

Plaintiff reasons, because Defendant Terry Town furnished several written warranties, its disclaimer of the implied warranty is ineffective. Plaintiff argues Defendant Terry Town made several written warranties: (1) a warranty on the batteries, (2) an exterior paint and interior upholstery warranty covering the consumer product, and (3) a road hazard service contract. Plaintiff further states, in a footnote, Defendant Terry Town made other written promises to repair defects in the motor home, referencing Exhibits 2 and 5 to Plaintiff's brief in support. [5] (Plaintiff's Brief in Support at 9 n. 2.)

> 5 Plaintiff has not attempted to explain how either of these documents constitute a written warranty. Plaintiff has not offered any authority suggesting either of these documents constitute a written warranty. The Court notes the merger clause contained in the purchase agreement just above the signature line indicating the purchase agreement contains the entire agreement between Defendant Terry Town and Plaintiff and "no other [*21] representation or inducement, verbal or written, has been made which is not contained in this agreement." (Defendant's Exhibit 5.) *See Parsley*, 327 F.Supp.2d at 802 (discussing merger clause).

None of the three warranties undermine the effectiveness of Defendant Terry Town's disclaimer. Defendant Terry Town did not make a warranty on the tires, paint, fabric or batteries. Defendant merely sold the road hazard warranty on behalf of Tire Guard. (Defendant's Exhibit 7 - road hazard contract.) Written in large print at the top of the document is "Classic Road Hazard Coverage by Tire Guard." (*Id.*) Under the space for the customer's signature, in a portion of the document with the title "LEINHOLDER," the document states "the Provider of this Contract is Tire Guard." (*Id.*) As discussed earlier, providing another parties' warranty without adopting that warranty, does not constitute the making of an express warranty by the supplier. *See Ducharme*, 321 F.Supp.2d at 854; *Parsley*, 327 F.Supp.2d at 805 (finding no MMWA violation because the dealer merely provided the plaintiff with copies of the manufacturers' warranties without adopting them, validly disclaimed all warranties under state law, and [*22] did not enter into a service contract with the plaintiff to repair the mobile home). Similarly, Defendant Terry Town merely sold the exterior paint and interior fabric warranty on behalf of Great Lakes Chemical.

(Defendant's Exhibit 7 - warranty registration form.) Defendant Terry Town's agreement to "cover 2 year so pro rating on the batteries" (Purchase Agreement) does not constitute a written warranty, as that term is defined by the MMWA. [6] Defendant Terry Town has not provided any written affirmation of fact or promise relating to the nature of the material or workmanship of the batteries or extended a written promise to refund, repair or replace the batteries should by fail to meet some specification. *See* 15 U.S.C. § 2301(6) (definition of "written warranty").

> 6 It appears the batteries were subject to a warranty issued by Defendant Spartan, not Defendant Terry Town. (Plaintiff's Exhibit 4.) Plaintiff's Exhibit 4 is a handwritten note which Plaintiff asserts, without support, was written by a salesperson for Defendant Terry Town. The note suggests Defendant Terry Town will pay for the warranty, pro rated over two years. The note states "motor home batteries have warranty thru Spartan [*23] Terry Town will pay for (2 year prorating)." (*Id.*)

Even if Plaintiff is correct that any of the three documents constitute a written warranty made by Defendant Terry Town, Plaintiff still cannot prevail. Section 2308(a) prohibits a supplier from disclaiming an implied warranty *with respect to such consumer product* if the supplier made a written warranty *with respect to such consumer product* or if the supplier enters into a service contract which *applies to such consumer product.* 15 U.S.C. § 2308(a) (emphasis added). Defendant Terry Town effectively disclaimed any implied warranties with respect to the 2006 Envoy and explicitly declined to adopt any of the manufacturers' warranties with regard to the 2006 Envoy. Assuming Plaintiff is correct that Defendant Terry Town made written warranties, those warranties did not cover the 2006 Envoy. In other words, Defendant Terry Town did not make a written warranty covering *such consumer product.* This distinction between warranties covering a larger consumer product, the RV, and warranties covering isolated consumer products, like batteries or tiers, which are part of the larger consumer product, is entirely consistent with the purpose of the [*24] MMWA. *See* 15 U.S.C. § 2301(1) (explaining the purpose of the MMWA is to improve the adequacy of information available and to prevent deception). Plaintiff negotiated and separately purchased warranties covering isolated parts of a larger consumer product. To conclude that Defendant Terry Town, who disclaimed any warranty covering the 2006 Envoy, is liable for repairs on the entire RV merely because it separately sold a warranty for tires and paint or agreed to pay for a warranty on a battery would not be consistent with the purpose of the Act.

B. Count IV - Revocation of Acceptance

Plaintiff's Count IV is a claim for revocation of acceptance under Michigan law. (Compl. P 32.) Michigan's revocation statute provides

> (1) The buyer may revoke his acceptance of a lot or commercial unit whose nonconformity substantially impairs its value to him if he has accepted it
>
> > (a) on the reasonable assumption that its nonconformity would be cured and it has not been seasonably cured; or
> >
> > (b) without discovery of such nonconformity if his acceptance was reasonably induced either by the difficulty of discovery before acceptance or by the seller's assurances.
>
> (2) Revocation of acceptance must occur within a [*25] reasonable time after the buyer discovers or should have discovered the ground for it and before any substantial change in the condition of the goods which is not caused by their own defects. It is not effective until the buyer notifies the seller of it.
>
> (3) A buyer who so revokes has the same rights and duties with regard to the goods involved as if he had rejected them.

MCL § 440.2608. Buyers may not revoke their acceptance for nonconformity when the dealer has disclaimed all warranties. *Sautner v. Fleetwood Enters., Inc.*, No. 05-73252, 2007 U.S. Dist. LEXIS 33564, 2007 WL 1343806 * 5 (E.D. Mich. May 8, 2007) (Roberts, J.) (involving the sale of a motor home); *Harnden v. Ford Motor Co.*, 408 F. Supp. 2d 309, 312-314 (E.D. Mich. 2005) (Edmunds, J.) (same) (*Harnden II); Parsley*, 327 F.Supp. at 803 (same); *Ducharme*, 321 F.Supp.2d at 855-856 (same). Plaintiff's authority on this point, *Head v. Phillips Camper Sales & Rental, Inc.*, 234 Mich. App. 94, 593 N.W.2d 595, (Mich. App. 1999) did not involve a disclaimer and has been distinguished from situations

where the dealer disclaimed warranties. *Sautner,* 2007 U.S. Dist. LEXIS 33564, 2007 WL 1343806 * 5; *Harnden II,* 408 F.Supp.2d at 314. As has been explained above, Defendant Travel Town effectively disclaimed all warranties. [*26] In addition, the purchase agreement contains a limitation of damages which explicitly states once the buyer has accepted the unit, it cannot be returned to dealer for a refund. (Purchase Agreement P 11.) Because of the disclaimer, Plaintiff has no right under Michigan law to revoke its acceptance of the RV.

C. Count I - Michigan Consumer Protection Act (MCPA)

Count I of the complaint alleges Defendants Travel Supreme, Spartan and Terry Town violated the MCPA by (1) representing the RV and the warranty had characteristics, uses, benefits, qualities and standards which they did not actually have, (2) represented the RV and warranty were of a particular quality and standard which they were not, (3) made gross discrepancies between the oral representations and written agreements and failed to provide promised benefits with regard to the transaction, (4) made factual statements which Plaintiff reasonably believed represented the standard, quality, characteristics and uses of the RV other than what they actually were, (5) failed to provide promised benefits with regard to the sale of the RV, (6) failed to reveal facts which tended to mislead or deceive Plaintiff and which could not reasonably [*27] be known by Plaintiff. (Compl. P 13.) Earlier in the complaint, Plaintiff states it has taken the RV to Defendant Travel Supreme and Defendant Spartan's authorized dealers or agents on ten separate occasions for fume/exhaust intrusion and other problems. (Compl. P 7.)

Michigan generally prohibits the use of unfair, unconscionable, or deceptive methods, acts or practices in the conduct of trade or commerce. MCL § 445.903(1). Claims under the MPCA for fraud or mistake must state the circumstances with particularity. *Michels v. Monaco Coach Corp.,* 298 F.Supp.2d 642, 650 (E.D. Mich. 2003) (citing FED. R. CIV. P. 9(b)). When the MPCA claim is based on breach of express or implied warranties, the claim need not include be pled with the same level of specificity. *Id.* However, a buyer may not assert a claim against a seller under the MCPA for alleged warranty related misrepresentations when the seller disclaimed all express and implied warranties. *Harnden II,* 408 F.Supp.2d at 314; *Ducharme,* 321 F.Supp.2d at 856.

Plaintiff's response attempts to provide some basis for its claim under the MCPA. The complaint describes the acts giving rise to the claim using only the general language of the MCPA [*28] and without any specific factual references. In its response, Plaintiff states "Defendant failed to provide benefits promised by its warranty." (Plaintiff's Response at 14.) As has been explained above, Defendant Terry Town did not give any express or implied warranties and, therefore, Plaintiff cannot base a claim on such alleged failure. Plaintiff's reference to *Mikos v. Chrysler Corp,* 158 Mich. App. 781, 404 N.W.2d 783 (Mich. App. 1987) (per curiam) does not alter this conclusion. The issue before the court in *Mikos* was whether a breach of an implied warranty constituted a violation of the MCPA. *Id.* at 784. The court concluded it did under MCL § 445.903(1)(y). *Id.* There has been no breach of an implied warranty here. Plaintiff also directs the court to MCL § 445.903(1)(u), explaining "Defendant failed to restore HRL's payments and down payment after HRL revoked acceptance and/or canceled the contract." (Plaintiff's Response at 15.) As explained above, the agreement between Plaintiff and Defendant Terry Town provided Plaintiff could not revoke its acceptance or seek a refund from Defendant Terry Town.

Plaintiff argues, even if the complaint has not been pled with the relevant specificity, any deficiency [*29] could be solved by an amendment to the complaint. Of course, this is a motion for summary judgment and not a motion to dismiss. The parties have had the benefit of discovery. Defendant Terry Town has established a lack of genuine issue of material fact on the MCPA claim, as pled and as the claim is described in Plaintiff's response. In order to survive the motion, at this stage Plaintiff must point to some evidence establishing a genuine issue of material fact that would allow it to proceed on the MCPA claim. Plaintiff argues the MCPA prohibits not just fraudulent acts, but also unfair and deceptive acts. Plaintiff, however, fails to point to any evidence that would lead to the conclusion that what Defendant Terry Town did was unfair or deceptive. Accordingly, Defendant is entitled to summary judgment on this claim.

IV. CONCLUSION

Defendant Terry Town is entitled to summary judgment on all four counts in the complaint. Defendant Terry Town did not make any express warranties on the 2006 Envoy. Defendant Terry Town disclaimed any implied warranties on the Envoy. The agreement between the parties limited the remedies available to Plaintiff such that it is not entitled to revoke the contract, [*30] return the RV or seek a refund from Defendant Terry Town. Plaintiff's claim under the Michigan Consumer Protection Act, as pled and as explained in Plaintiff's response, assumes breach of warranty and failure to refund payments after the contract was cancelled. Defendant Terry Town has established a lack of a genuine issue of material fact on each count and Plaintiff has failed to present documentary evidence to create a genuine issue of material fact. Accordingly,

Defendant Terry Town's motion (Dkt. No. 58) for summary judgment is **GRANTED.**

Date: February 20, 2009

/s/ Paul L. Maloney

Paul L. Maloney

Chief United States District Judge

LEXSEE

**STEPHEN L. HUBBARD, on behalf of himself and all others similarly situated, Plaintiff, -against- GENERAL MOTORS CORPORATION, Defendant.**

**95 Civ. 4362 (AGS)**

**UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK**

**1996 U.S. Dist. LEXIS 6974; 39 U.C.C. Rep. Serv. 2d (Callaghan) 83**

**May 22, 1996, Decided**
**May 22, 1996, FILED**

**DISPOSITION:** [*1] Defendant's motion to dismiss the Complaint for failure to state a claim is granted.

**COUNSEL:** For STEPHEN L. HUBBARD, on behalf of himself and all others similarly situated, plaintiff: Patricia M. Hynes, Milberg Weiss Bershad, Specthrie & Lerach, New York, NY. Melvyn I. Weiss, New York, NY. Robert A. Wallner, Milberg Weiss Bershad Hynes & Lerach, New York, NY.

**JUDGES:** ALLEN G. SCHWARTZ, U.S.D.J.

**OPINION BY:** ALLEN G. SCHWARTZ

**OPINION**

*OPINION & ORDER*

ALLEN G. SCHWARTZ, DISTRICT JUDGE:

This matter is before the Court upon defendant's motion to dismiss the Complaint for lack of subject matter jurisdiction and failure to state a claim. Plaintiff requests that, if the Court finds plaintiff's Complaint deficient, he be granted leave to file an Amended Complaint. For the reasons stated below, defendant's motion to dismiss is granted; plaintiff is granted leave to file an Amended Complaint asserting a cause of action for breach of implied warranty.

*BACKGROUND*

Plaintiff Stephen L. Hubbard is a purchaser and current owner of a Chevrolet "Suburban" automobile, manufactured by defendant General Motors Corporation ("GM"). Hubbard brings this action on behalf of himself and a putative class consisting [*2] of "all persons in the United States who purchased or leased a model-year 1992, 1993, 1994 or 1995 Chevrolet Suburban vehicle." [1] Compl. P 5. Plaintiff asserts that the Court has jurisdiction over this action pursuant to Title 28, United States Code, Section 1332 (diversity), since "plaintiff and defendant are citizens of different States and the matter in controversy exceeds the sum or value of $ 50,000, exclusive of interest and costs." Compl. P 1.

1 Plaintiff has not moved to certify the class.

Plaintiff alleges that GM has outfitted the Suburbans with "a defective braking system", which causes the vehicles not to stop properly upon application of the brakes. Compl. P 11. Plaintiff claims that the National Highway Traffic Safety Administration ("NHTSA") commenced an investigation of poor brake performance on 1992-1995 Suburbans, following the receipt of 141 complaints concerning the vehicles' brakes.

According to Hubbard, GM knew of the alleged product defect when it began to offer the Suburbans for sale [*3] and "spent millions of dollars in deceitfully advertising the purported quality and dependability" of the vehicles. Compl. P 12. Plaintiff claims that GM ran an advertisement in the June 13, 1994 issue of *Newsweek* that stated, "Small surprise that Chevy Suburban, Blazer and S-Blazer are the most popular family of their kind anywhere. Or that they're from Chevrolet, the most dependable, long-lasting trucks on the planet," and that the vehicles are "Like a Rock". *Id.* Plaintiff alleges that he and the other members of the class he seeks to represent "reasonably relied upon the representations of GM and its agents and the advertisements disseminated by GM," and that such reliance was "fraudulently induced" by GM. Compl. P 15.

The claimed damages of plaintiff and the putative class members are stated to be "performance problems with the vehicle's braking system, as well as a reduction

in the resale value and the trade-in value of the vehicles." Compl. P 15. Specifically excluded from the reputed class are "any persons who have suffered personal injury as a result of defects" in the Suburbans. Compl. P 5.

Plaintiff asserts a cause of action for common law fraud, alleging that GM's [*4] representations and advertisements for the Suburbans were deceptive and misleading and were accompanied by a "wanton and willful disregard of the rights of others or were motivated by malice, with the intent to defraud and induce plaintiff's and the class members' reliance." Compl. P 18. In addition, plaintiff asserts claims for breach of express and implied warranty and negligent misrepresentation of fact.

On behalf of himself and the alleged class, plaintiff seeks rescission, actual damages, punitive damages and interest, as well as injunctive relief in the form of a court order requiring GM to issue corrective disclosures and take corrective actions with respect to the alleged brake defect and imposing a constructive trust upon monies obtained by GM as a result of the alleged wrongful conduct.

*DISCUSSION*

I. *Subject Matter Jurisdiction*

Defendant moves to dismiss the Complaint for lack of subject matter jurisdiction on the ground that the amount in controversy does not, as a matter of law, meet the $ 50,000 jurisdictional amount requirement. [2] GM argues that plaintiff must allege that the amount in controversy exceeds $ 50,000 *for each purported class member*. [*5]

> 2 Although not stated by either party, presumably, the value of a Suburban is less than $ 50,000.

In order for a complaint to be dismissed for failure to satisfy the amount in controversy requirement of diversity jurisdiction, "it must appear to a legal certainty that the claim is really for less than the jurisdictional amount." *St. Paul Mercury Indemnity Co. v. Red Cab Co.*, 303 U.S. 283, 288-89, 58 S. Ct. 586, 590, 82 L. Ed. 845 (1938). "Unless the law gives a different result, the sum claimed by the plaintiff controls if the claim is apparently made in good faith." *Id.; see also Ochoa v. Interbrew America, Inc.*, 999 F.2d 626, 628-29 (2d Cir. 1993).

If punitive damages are permitted under the controlling law, "the demand for such damages may be included in determining whether the jurisdictional amount is satisfied." *A.F.A. Tours, Inc. v. Whitchurch*, 937 F.2d 82, 87 (2d Cir. 1991); *see also* 14A Charles A. Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice and Procedure § 3702 (1985) [*6] ("Exemplary or punitive damages, if permitted under the governing law, can be included in determining whether the amount in controversy requirement has been met"). Moreover, it is well established that "when several plaintiffs unite to enforce a single title or right, in which they have a common and undivided interest, it is enough if their interests collectively equal the jurisdictional amount." *Zahn v. Intern'l Paper Co.*, 414 U.S. 291, 294, 94 S. Ct. 505, 508, 38 L. Ed. 2d 511 (1973).

Under New York law, a plaintiff may recover punitive damages on a fraud claim if the defendant's conduct constituted a harm aimed at the public generally, or is shown to be willful and wanton, outrageously immoral or criminal in nature. *Giblin v. Murphy*, 536 N.Y.S.2d 54, 56, 73 N.Y.2d 769, 772, 532 N.E.2d 1282 (1988); *Sforza v. Health Ins. Plan of Greater New York*, 619 N.Y.S.2d 734, 736, 210 A.D.2d 214 (N.Y.A.D. 1994). However, the Court finds that the Complaint fails to state a claim for fraud, and, therefore, for punitive damages. *See infra* at 15-16. Thus, the demand for punitive damages may not be included in the computation of the jurisdictional amount.

Nevertheless, it does not [*7] appear to a legal certainty that the claim is for an amount less than $ 50,000. If plaintiff and the alleged class members were merely seeking monetary damages, which they could do as well on an individual basis, they could not aggregate their claims in order to gain federal jurisdiction. *Zahn*, 414 U.S. at 301, 94 S. Ct. at 512. However, plaintiff and the alleged class members seek injunctive relief in the form of an order requiring GM to issue corrective disclosures and take corrective actions, such as a recall of the vehicles, and imposing a constructive trust upon monies obtained by GM from selling the Suburbans. In *Gibbs v. E.I. DuPont De Nemours & Co., Inc.*, 876 F. Supp. 475 (W.D.N.Y. 1995), the court held that the class action plaintiffs had a common and undivided interest in the injunctive relief sought because "in a suit for injunctive or declaratory relief, the amount in controversy is measured by the value of the object of the litigation," in that case a constructive trust. *Id.* at 479 (citing *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 346-47, 97 S. Ct. 2434, 2443-44, 53 L. Ed. 2d 383 (1977)); *see also A.F.A. Tours, Inc.*, 937 F.2d at 87. [*8]

The Court finds that plaintiff and the alleged class members have a common and undivided interest in the injunctive and declaratory relief sought herein. Therefore, the jurisdictional amount requirement is satisfied if their interests collectively exceed $ 50,000. It

is not clear, to a legal certainty, that the cost of instituting a recall program for the vehicles affected by the alleged defect and/or of making corrective disclosures would be less than $ 50,000. Accordingly, the Court may exercise diversity jurisdiction over this action. Defendant's motion to dismiss for lack of subject matter jurisdiction is, therefore, denied.

II. *Sufficiency of Plaintiff's Claim*

Defendant moves to dismiss the Complaint for failure to state a claim, arguing that plaintiff has failed to plead the requisite elements of any cause of action. In ruling on a motion to dismiss, "a court must construe in plaintiff's favor any well-pleaded factual allegations in the complaint. . . . Dismissal of the complaint is proper only where it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Allen v. Westpoint-Pepperell, Inc.,* [*9] 945 F.2d 40, 44 (2d Cir. 1991).

A. *Damages*

Defendant contends that plaintiff has failed to plead any damages, and that damages are an essential element of claims for breach of express or implied warranty, fraud and negligent misrepresentation. GM states that, fatal to plaintiff's claims is the absence of an allegation that Hubbard himself has experienced performance problems or has attempted to resell his Suburban only to discover that its value has decreased. It is plaintiff's position that he and the putative class members were damaged at the moment they purchased their Suburban vehicles, for they would not have made such a purchase had they known of the alleged defect.

Purchasers of an allegedly defective product have no legally recognizable claim where the alleged defect has not manifested itself in the product they own. *See Feinstein v. Firestone Tire and Rubber Co.,* 535 F. Supp. 595, 603 (S.D.N.Y. 1982) ("Plaintiff's bald assertion that a 'common' defect *which never manifests itself 'ipso facto* caused economic loss' and breach of implied warranty is simply not the law"); *Yost v. General Motors Corp.,* 651 F. Supp. 656, 657 (D.N.J. 1986) (alleged design defect [*10] in Cadillacs which is "likely" to cause damage and "may" create potential safety hazards did not support a claim for breach of warranty or fraud); *Barbarin v. General Motors Corp.,* 1993 U.S. Dist. LEXIS 20980, 84 Civ. 0888 (TPJ) (D.D.C. Sept. 22, 1993) 1993 WL 765821 at *2 (dismissing "the claims of all plaintiffs whose X-cars never experienced the phenomenon of 'premature rear wheel lock-up'"). Thus, a Suburban that performs satisfactorily and never exhibits the alleged braking system defect is fit for the purposes intended and does not give rise to a breach of warranty claim or any other.

It is unclear from plaintiff's complaint whether Hubbard claims that the alleged defect has manifested itself in his Suburban. Rather than dismissing the Complaint outright on this ground, the Court convened a conference on May 15, 1996, at which it inquired on the record as to whether plaintiff had experienced the alleged defect in operating his automobile. Plaintiff stated that the alleged defect had in fact manifested itself in his Suburban, which caused him to take the vehicle to an authorized dealer for repair. Accordingly, the Court grants defendant's motion to dismiss the Complaint for failure to plead damages but, [*11] in addition, grants plaintiff leave to file an amended complaint that shall include this information. [3] The Court further instructs plaintiff to identify the alleged brake defect in greater detail in the Amended Complaint, so as to give defendant satisfactory notice of the substance of his claims. *See Duncan v. AT&T Communications, Inc.,* 668 F. Supp. 232, 234 (S.D.N.Y. 1987).

3 The Court notes as well that the alleged class is overly broad. All members of the putative class must have experienced the alleged brake defect in their Suburbans in order to have legally recognizable claims.

B. *Breach of Warranty Claims*

Defendant argues that plaintiff's breach of warranty claims must be dismissed because plaintiff failed to allege that GM has been notified of the breach and resultant damages. Section 2-607(3) of the New York Uniform Commercial Code provides that, "where a tender has been accepted (a) the buyer must within a reasonable time after he discovers or should have discovered any breach notify the [*12] seller of breach or be barred from any remedy." N.Y. U.C.C. § 2-607(3) (McKinney's 1993).

Plaintiff points out that several courts in other states have ruled that § 2-607(3)(a) requires a buyer to give notice only to his or her immediate seller, not a remote manufacturer. [4] *See Cipollone v. Liggett Group, Inc.,* 683 F. Supp. 1487, 1498 (D.N.J. 1988); *Sullivan v. Young Brothers and Co. Inc.,* 893 F. Supp. 1148 (D.Me. 1995) 1995 WL 455749 at *11 ("The Court concludes that the Maine Law Court would follow the reasoning of the majority of courts and conclude that for purposes of a breach of warranty claim, it is not necessary to give notice to remote sellers").

4 Plaintiff also points out that several courts have held that the filing of a complaint may constitute sufficient notice under this provision. *See Cipollone,* 683 F. Supp. at 1498; *Graham v. Wyeth Labs.,* 666 F. Supp. 1483, 1499-1500

(D.Kan. 1987). However, the only New York case cited by plaintiff, or found by the Court, as authority for this proposition pre-dates the Uniform Commercial Code. *See* Silverstein v. R.H. Macy & Co., 266 A.D. 5, 40 N.Y.S.2d 916, 920 (A.D. 1st Dep't 1943).

[*13]

While notice is a requirement under New York law for a breach of warranty claim, *Burns v. Volkswagen of America Inc.*, 97 A.D.2d 977, 468 N.Y.S.2d 958, 959 (A.D. 4th Dep't 1983), the sufficiency and timeliness of the notice is generally a question for the jury. *Mendelson v. General Motors Corp.*, 105 Misc. 2d 346, 432 N.Y.S.2d 132, 136 (N.Y. Sup. 1980), *aff'd*, 81 A.D.2d 831, 441 N.Y.S.2d 410 (A.D. 2d Dep't 1981). One New York court has noted that "(a) notice need only be given to the dealer; (b) the content of the notification need merely be sufficient to let the seller know of the nature of the defect; (c) oral notice satisfies the notice requirement of 2-607(3)(a)." *Hyde v. General Motors Corp.*, 1982 Trade Cases P64,595 (N.Y. Sup. Oct. 16, 1981), 1981 WL 11468 at *2. In *Mendelson, supra*, an action brought by purchasers against the manufacturer, the court noted that the complaint contained a general allegation of notice and held that the sufficiency and timeliness of notice of a breach of warranty was a question of fact to be determined by the jury. *Id.* at 136.

Plaintiff's Complaint lacks any allegation that plaintiff notified GM, or the dealer from which [*14] he purchased the vehicle, of the claimed defect. Accordingly, the Court grants defendant's motion to dismiss plaintiff's claims for breach of express and implied warranty for failure to allege notice. Plaintiff, however, is granted leave to replead. [5]

5 Plaintiff has indicated that some form of notice may have occurred. At the conference held on May 15, 1996, the following colloquy took place:

> Plaintiff: . . . The vehicle had been brought into the dealer on several occasions complaining of the brake failure.
>
> The Court: And so you gave notice to GM of that defect before you filed the complaint here of a breach of warranty?
>
> Plaintiff: They had notice because they obviously brought it into their authorized dealer.

Transcript of May 15, 1996 Conference at 8.

Defendant further submits that plaintiff's claims for breach of implied warranty must be dismissed because plaintiff lacks privity with GM. It is undisputed that Hubbard did not purchase his Suburban directly from GM.

Section 2-318 [*15] of the Uniform Commercial Code provides as follows:

> A seller's warranty whether express or implied extends to any natural person if it is reasonable to expect that such person may use, consume or be affected by the goods and who is injured in person by breach of warranty. A seller may not exclude or limit the operation of this section.

N.Y. U.C.C. § 2-318 (McKinney's 1993). The court in *Mendelson,* referring to Section 2-318, stated,

> although the section removes the privity bar only where the plaintiff is "injured in person", it has been said that it does not prevent the courts from abolishing the vertical privity requirement when a nonprivity buyer seeks recovery for direct *economic loss.* However, the courts in New York have not done so.

432 N.Y.S.2d at 134 (citations omitted) (emphasis supplied).

Thus, "under New York law, absent privity of contract, a purchaser cannot recover mere economic loss against a manufacturer under a theory of breach of implied warranty." *Westchester County v. General Motors Corp.*, 555 F. Supp. 290, 294 (S.D.N.Y. 1983); *see also Rosen v. Hyundai Group (Korea)*, 829 F. Supp. 41, 49-50 (E.D.N.Y. 1993) (only "sellers" [*16] are liable for breach of warranty under N.Y. U.C.C.). Citing this rule, defendant urges that plaintiff's claim for breach of implied warranty must be dismissed.

However, New York recognizes an exception to this principle where the product in question is a "thing of danger". So that,

> where an article is of such a character that when used for the purpose for which it is made it is likely to be a source of danger to several or many people if not properly designed and fashioned, *the manufacturer as well as the vendor* is

> liable, for breach of law-implied warranties, to the persons whose use is contemplated. [6]

*Goldberg v. Kollsman Instrument Corp.*, 12 N.Y.2d 432, 436-37, 240 N.Y.S.2d 592, 191 N.E.2d 81 (1963) (emphasis supplied); *see also All-* *Tronics, Inc. v. Ampelectric Co.*, 44 A.D.2d 693, 354 N.Y.S.2d 154, 156 (A.D. 2d Dep't 1974) ("a defect in a potentially hazardous product subjects the distributor-vendor *and the manufacturer* to liability to a purchaser for breach of implied warranties").

> 6 Defendant argues that the court in *Goldberg* waived the privity requirement only because the plaintiff sought recovery for personal injury, which plaintiff in this case does not seek. There is no reason to find that the *Goldberg* holding is limited to such a circumstance. Although the plaintiff in *Goldberg* was the administratrix of the estate of a passenger killed in an airplane crash, the Court of Appeals stated that it was answering the broad question: "does a manufacturer's implied warranty of fitness of his product for its contemplated use run in favor of all its intended users, despite lack of privity of contract?" 12 N.Y.2d at 434-35.

[*17] The purchaser of an automobile is certainly a person whose use of the product is contemplated by the manufacturer. Moreover, a vehicle equipped with a defective braking system is likely to be a source of danger when driven. [7] *See* *Comstock v. General Motors Corp.*, 358 Mich. 163, 99 N.W.2d 627, 632 (Mich. 1959). Therefore, the Court finds that plaintiff may assert a claim for breach of implied warranty against GM, even though Hubbard is not in privity with GM.

> 7 In *Mendelson, supra*, the plaintiffs alleged that the defendant substituted an inferior transmission for the one that should have been installed in its 1979 Oldsmobiles. The plaintiff in *Westchester County, supra* claimed that the defendant had manufactured defective air conditioners, which were installed in the buses it purchased; and the claim in *Rosen, supra*, was for defective pianos. The Court finds that plaintiff's claim alleging a defective braking system is qualitatively different from claims against an automobile manufacturer alleging the use of inferior transmissions or the design of defective air conditioners, in that a vehicle with defective brakes is a thing of danger.

[*18] Defendant further urges the Court to dismiss plaintiff's claim for breach of express warranty on the ground that the only allegation of language that, according to plaintiff, constitutes an express warranty from GM -- *i.e.* the June 1994 *Newsweek* advertisement calling Suburbans "popular", "dependable" and "like a rock" -- is mere puffery, which does not constitute an express warranty. "Puffing" has been described as "making generalized or exaggerated statements such that a reasonable consumer would not interpret the statement as a factual claim upon which he or she could rely." *In re All Terrain Vehicle Litigation*, 771 F. Supp. 1057, 1061 (C.D.Cal. 1991).

In *In re All Terrain Vehicle Litigation,* the court found that the defendant's advertising statements claiming that the "all terrain vehicles" were "precisely balanced in the frame for superb handling," and "the ultimate recreational vehicle," which would "embarrass the wind" were mere puffery, which did not support the plaintiff's claim. 771 F. Supp. at 1061; *see also* *Falcon Equip. Corp. v. Courtesy Lincoln Mercury, Inc.*, 536 F.2d 806, 809 (8th Cir. 1976) (advertisement comparing Mark IV with Cadillac products [*19] in areas concerning comfort and riding characteristics were "merely puffing" and did not give rise to an express warranty); *Berkebile v. Brantly Helicopter Corp.*, 462 Pa. 83, 337 A.2d 893, 903 (Pa. 1975) (advertising statement that helicopter was "safe", "dependable" and "easy to operate" constituted mere puffing as a matter of law); *The Sample Inc. v. Pendleton Woolen Mills, Inc.*, 704 F. Supp. 498, 505 (S.D.N.Y. 1989) (retailer could not reasonably rely on manufacturer's advertisements about "relationships that last a lifetime" to conclude that its account would not be terminated without good cause because statements were "puffing"); *Groden v. Random House, Inc.*, 1994 U.S. Dist. LEXIS 11794, No. 94 Civ. 1074 (JSM) (S.D.N.Y. Aug. 23, 1994), 1994 WL 455555 at *5 (dismissing false advertising claim, holding that an allegedly misleading statement was mere "puffing").

Plaintiff points out that, under New York law, the question of whether representations made in advertisements are "warranties and, therefore, a part of the bargain, or merely expressions of the seller's opinion, or mere 'puffing', is almost always a question of fact for a jury's resolution," as is the question of whether and to what extent [*20] the consumer relied upon the representations at issue. *Yuzwak v. Dygert*, 144 A.D.2d 938, 534 N.Y.S.2d 35, 36 (A.D. 4th Dep't 1988); *but see* *Simon v. Cunard Line Ltd.*, 75 A.D.2d 283, 428 N.Y.S.2d 952 (A.D. 1st Dep't 1980) (advertising statements that the cruise ship QUEEN ELIZABETH II was "the greatest ship in the world" and that "everything about the Queen lives up to the high standards you would expect aboard the greatest ship in the world" determined to be "mere puffing and not actionable"). In *Yuzwak v. Dygert, supra*, the Appellate Division reinstated the

plaintiff's claims for breach of warranty and fraud based on oral and written statements that a horse was quiet, easy to handle, did not kick and would make a fine show horse for children. Plaintiff in that case purchased the horse for her children, one of whom was injured when the horse kicked her. The court held that the seller's statements were "not so obviously 'puffing' that their significance should be determined as a matter of law." 534 N.Y.S.2d at 36.

In contrast, the advertising proclamations that Suburbans are "like a rock", "popular" and "the most dependable, long-lasting trucks on the planet", *see* Compl. [*21] at P 12, are generalized and exaggerated claims, which a reasonable consumer could not rely upon as statements of fact. Moreover, these statements make no reference whatsoever to the type or quality of the vehicles' braking system. In short, the Court finds that defendant's alleged advertising statements constitute mere puffing and do not create an express warranty upon which plaintiff could reasonably rely. Accordingly, defendant's motion to dismiss plaintiff's second cause of action for breach of express warranty is granted.

C. *Fraud and Negligent Misrepresentation Claims*

Defendant moves to dismiss plaintiff's claims for fraud and negligent misrepresentation on the grounds that, *inter alia,* the alleged statements made by GM are not sufficiently material or factual to give rise to such claims. [8] In order to state a claim for fraud or negligent misrepresentation, plaintiff must allege, *inter alia,* the misrepresentation *of a material fact. See Mallis v. Bankers Trust Co.,* 615 F.2d 68, 80 (2d Cir. 1980), *cert. denied,* 449 U.S. 1123, 101 S. Ct. 938, 67 L. Ed. 2d 109 (1981) (stating elements of fraud claim under New York law).

8 Defendant also argues that (1) GM had no duty to disclose and (2) plaintiff failed to allege reliance on the advertisement. The Court need not reach these issues.

[*22] Plaintiff's claims for fraud and negligent misrepresentation are based on defendant's advertisement that Suburbans are "like a rock", "popular" and "dependable", *see supra.* As stated above, the Court finds that these statements are puffery, upon which a purchaser could not reasonably rely. As mere puffery, such statements are not actionable as fraudulent or negligent misrepresentations of fact. *See Metzner v. D.H. Blair & Co.,* 689 F. Supp. 262, 263-64 (S.D.N.Y. 1988). Accordingly, defendant's motion to dismiss plaintiff's first and fourth causes of action for common law fraud and negligent misrepresentation, respectively, is granted.

The Court denies plaintiff leave to replead claims for relief sounding in breach of express warranty, common law fraud and negligent misrepresentation. The underlying facts and circumstances relied upon by plaintiff are not a proper subject for such relief; therefore, an amended complaint asserting these claims would be without merit and futile. *See Foman v. Davis,* 371 U.S. 178, 182, 83 S. Ct. 227, 230, 9 L. Ed. 2d 222 (1962).

*CONCLUSION*

Defendant's motion to dismiss the Complaint for failure to state a claim is granted. Plaintiff [*23] is granted leave to file an Amended Complaint asserting a cause of action for breach of implied warranty within 30 days of the date of this Order.

SO ORDERED.

ALLEN G. SCHWARTZ, U.S.D.J.

Dated: New York, New York

May 22, 1996

LEXSEE

**HURON TOOL AND ENGINEERING COMPANY, Plaintiff-Appellant, v PRECISION CONSULTING SERVICES, INC., and JOSEPH B. WULFFENSTEIN, jointly and severally, Defendants-Appellees.**

**No. 161050**

**COURT OF APPEALS OF MICHIGAN**

**209 Mich. App. 365; 532 N.W.2d 541; 1995 Mich. App. LEXIS 103; 26 U.C.C. Rep. Serv. 2d (Callaghan) 703**

**November 1, 1994, Submitted**
**March 20, 1995, Decided**

**DISPOSITION:** [***1] Affirmed in part, reversed in part, and remanded.

**COUNSEL:** John S. Paterson and Kimberly A. Tomczyk, for the plaintiff. Sandusky.

O'Sullivan, Beauchamp, Kelly & Whipple (by David C. Whipple and David Allen Keyes), for the defendants. Port Huron.

**JUDGES:** Before: Fitzgerald, P.J., and Michael J. Kelly and E.R. Post, * JJ.

* Circuit judge, sitting on the Court of Appeals by assignment

**OPINION BY:** MICHAEL J. KELLY [*367] [**542] MICHAEL J. KELLY, J.Plaintiff appeals as of right an order of the circuit court granting defendants' motion for summary disposition under MCR 2.116(C)(7). We affirm in part, reverse in part, and remand. [**543] The parties entered into an agreement for the sale of a computer software system in November 1986. The agreement provided that defendant Precision Consulting Services, Inc., would provide plaintiff Huron Tool and Engineering Company with "system's design, programming, training and installation services." Plaintiff paid the full purchase price by May 13, 1988. After that date, defendants performed additional work on the system in order to customize the software for plaintiff's use. Each time a modification was made, defendants billed plaintiff separately. Included [***2] in the additional work was the installation of a program for job closing in November 1988 and a shop order processing application in July 1991.

**OPINION**

Because of alleged defects in the software system, plaintiff filed suit on July 20, 1992, alleging breach of contract and warranty, fraud, and misrepresentation. [1] Defendants filed a motion for summary disposition under MCR 2.116(C)(7), claiming that plaintiff's claims were barred by the four-year statute of limitation in the Uniform Commercial Code, MCL 440.2725(1); MSA 19.2725(1). Plaintiff argued that its claim did not accrue until November 1988 at the earliest. Plaintiff also argued that its fraud claim was independent of its contractual claims and, therefore, outside the scope of the UCC [*368] statute of limitation. The circuit court rejected plaintiff's arguments and, applying the UCC limitation period to all of plaintiff's claim, dismissed the entire action under MCR 2.116(C)(7).

1 In discussing the viability of plaintiff's intentional tort claims of fraud and misrepresentation, we will refer in general to plaintiff's "fraud claim.

[***3] II

The central dispute on appeal concerns plaintiff's fraud claim. At issue is whether the economic loss doctrine bars plaintiff from bringing a fraud claim independent of its contractual claims under the UCC. Defendants argue that the economic loss doctrine bars any action in tort, including fraud, where plaintiff suffers only economic damages and has a cause of action in contract under the UCC. Although defendants cite *Neibarger v Universal Cooperatives, Inc*, 439 Mich 512; 486 N.W.2d 612 (1992), in support of their position, that decision only addressed the application of the economic loss doctrine to nonintentional torts. The viability of the doctrine in actions for intentional torts, particularly fraud, remains an issue unaddressed in Michigan. After

review of decisions in other jurisdictions and of the history and rationale of the economic loss doctrine in Michigan, we conclude that fraud in the inducement is an exception to the doctrine, but that plaintiff has failed to plead such fraud and, therefore, is restricted to its contractual remedies under the UCC.

A

The economic loss doctrine provides that "where a purchaser's expectations in a sale are frustrated because [***4] the product he bought is not working properly, his remedy is said to be in contract alone, for he has suffered only 'economic' losses." *Kennedy v Columbia Lumber & Mfg Co,* [*369] 299 S. Ct. 335, 345; 384 S.E.2d 730 (1989), quoted in *Neibarger, supra* at 520. Although our Supreme Court's most authoritative pronouncement concerning the applicability of the economic loss doctrine in Michigan did not appear until recently in *Neibarger, supra,* the doctrine has firm roots in Michigan jurisprudence. See, e.g., *McCann v Brody-Built Construction Co, Inc,* 197 Mich. App. 512; 496 N.W.2d 349 (1992); *Rust-Pruf Corp v Ford Motor Co,* 172 Mich. App. 58; 431 N.W.2d 245 (1988); *Great American Ins Co v Paty's Inc,* 154 Mich. App. 634; 397 N.W.2d 853 (1986); *A C Hoyle Co v Sperry Rand Corp,* 128 Mich. App. 557; 340 N.W.2d 326 (1983); *McGhee v GMC Truck & Coach Division,* 98 Mich. App. 495; 296 N.W.2d 286 (1980) (applying the economic loss doctrine).

In *Neibarger,* the plaintiffs, purchasers of allegedly defective products, attempted to circumvent the strict UCC limitation period by pleading claims sounding in tort. [2] 439 Mich 517. [**544] Applying the economic loss doctrine, the Supreme [***5] Court determined that the plaintiffs' tort claims were subject to the UCC because they alleged damages amounting to nothing more than economic losses in the form of product defects. Id. at 530. These damages merely reflected a concern about the quality expected by the buyer and promised by the seller, which is the essence of a warranty action under [*370] the UCC. *Id.* at 531. Because the UCC already addressed the plaintiffs' concerns, the Court held that the plaintiffs could not pursue an independent tort claim. Any other holding, the Court added, would render the UCC meaningless and contract law would drown in a sea of tort. Id. at 528, quoting *East River Steamship Corp v Transamerica Delaval Inc,* 476 U.S. 858, 866; 106 S. Ct. 2295; 90 L. Ed. 2d 865 (1986).

2 Although the three-year statute of limitation for tort claims invoked by the plaintiffs in *Neibarger,* MCL 600.5805(9); 27A.5805(9), was actually shorter than the four-year UCC limitation period, it was nonetheless more advantageous for the plaintiffs. Whereas the UCC limitation period began to run "when the breach occurs, regardless of the aggrieved party's lack of knowledge of the breach," MCL 440.2725(2); MSA 19.2725(2), the accrual date of a claim under MCL 600.5805(9); 27A.5805(9) was subject to the discovery rule. In this case, plaintiff seeks to circumvent the four-year UCC statute of limitation by alleging fraud, presumably because it is subject to the more liberal six-year limitation period in MCL 600.5813; MSA 27A.5813. *Blue Cross & Blue Shield of Michigan v Folkema,* 174 Mich. App. 476, 480-481; 436 N.W.2d 670 (1988).

[***6] B

The tort claims asserted by the plaintiffs in *Neibarger* sounded in negligence and strict liability. Although the *Neibarger* Court discussed the economic loss doctrine in broad terms, referring generally to the viability of "tort" claims under the doctrine without further distinction, we find nothing in the opinion to suggest that the Court's holding extended beyond the limited facts of that case to address the viability of intentional torts such as fraud. We therefore reject defendants' simple argument that because "tort" claims for economic losses are barred, and because fraud is a "tort," plaintiff's fraud claim is barred. Instead, a more thorough analysis of the issue is appropriate, one that takes into consideration the underlying policies of tort and contract law and seeks to define the meaning of "tort" within the economic loss doctrine. To this end, we consider helpful the decisions of other state and federal courts concerning the same issue.

Although the issue has been addressed in only a handful of jurisdictions, the emerging trend is clearly toward creating an exception to the economic loss doctrine for a select group of intentional torts. See, e.g., *Interstate* [***7] *Securities Corp v Hayes* Corp, 920 F.2d 769, 776, n 11 (CA 11, 1991) [*371] (defamation); *Northern States Power Co* v Int'l Telephone & Telegraph Corp, 550 F. Supp 108 (D Minn, 1982) (fraudulent inducement to contract and misrepresentation); *Moorman Mfg Co v Nat'l Tank Co,* 91 Ill 2d 69; 435 N.E.2d 443, 61 Ill. Dec. 746 (1982) (intentional misrepresentation); *Werblood v Columbia College of Chicago,* 180 Ill. App. 3d 967; 536 N.E.2d 750, 129 Ill. Dec. 700 (1989) (tortious interference with prospective economic advantage); *Santucci Construction Co v Baxter & Woodman, Inc,* 151 Ill. App. 3d 547; 502 N.E.2d 1134, 104 Ill. Dec. 474 (1987) (intentional interference with contractual relations). With regard to the specific intentional tort of fraud, courts generally have distinguished fraud in the inducement as the only kind of fraud claim not barred by the economic loss doctrine. We

believe this distinction is warranted in light of the rationale of the economic loss doctrine:

> The distinction is critical, for the essence of the "economic loss" rule is that contract law and tort law are separate and distinct, and the courts should maintain that separation in the allowable remedies. [***8] There is a danger that tort remedies could simply engulf the contractual remedies and thereby undermine the reliability of commercial transactions. Once the contract has been made, the parties should be governed by it.
>
> Fraud in the inducement, however, addresses a situation where the claim is that one party was tricked into contracting. It is based on pre-contractual conduct which is, under the law, a recognized tort. *[Williams Electric Co, Inc v Honeywell,* [**545] *Inc,* 772 F. Supp 1225, 1237-1238 (ND Fla, 1991).]

The decision of the Florida federal district court in *Williams Electric* comports with the rationale of the economic loss doctrine as expressed by the Florida Supreme Court in *Florida Power & Light Co v Westinghouse Electric Corp,* 510 So. 2d 899 [*372] (Fla, 1987). There, the court held that the doctrine prohibited a buyer under a contract for goods to recover economic losses in tort without a claim for personal injury or for damage to property other than the goods sold. This holding reflects the rule adopted by our Supreme Court in *Neibarger, supra.* The *Florida Power* court explained that the policy behind the doctrine "encourages parties to negotiate economic [***9] risks through warranty provisions and price." 510 So. 2d 901. Another Florida court noted that the doctrine "shields a defendant from unlimited liability for all economic consequences of a negligent act, particularly in a commercial setting, thus keeping the risk of liability reasonably calculable." *Bay Garden Manor Condominium Ass'n, Inc v James D Marks Associates, Inc,* 576 So. 2d 744, 745 (Fla App, 1991), citing *Local Joint Exec Bd, Culinary Workers Union, Local 226 v Stern,* 98 Nev 409, 410; 651 P.2d 637 (1982). This policy rationale has been recognized by federal courts applying Michigan law. See *Neibarger, supra* at 525-526, quoting *Consumers Power Co v Mississippi Valley Structural Steel Co,* 636 F. Supp 1100, 1105 (ED Mich, 1986). It also was recognized implicitly by this Court in *Auto-Owners Ins Co v Chrysler Corp,* 129 Mich. App. 38, 42; 341 N.W.2d 223 (1983). There, this Court held that the economic loss doctrine does not apply where there is no contractual relationship between the parties--that is, where the parties have never been in a position to negotiate the economic risks themselves. See also *Neibarger, supra* at 525.

In light of this rationale, [***10] we decline to adopt defendants' position that the economic loss doctrine precludes *any* fraud claim. Fraud in the inducement presents a special situation where parties to a contract appear to negotiate freely--which normally would constitute grounds for invoking [*373] the economic loss doctrine--but where in fact the ability of one party to negotiate fair terms and make an informed decision is undermined by the other party's fraudulent behavior. In contrast, where the only misrepresentation by the dishonest party concerns the quality or character of the goods sold, the other party is still free to negotiate warranty and other terms to account for possible defects in the goods.

The distinction between fraud in the inducement and other kinds of fraud is the same as the distinction drawn by a New Jersey federal district court between fraud extraneous to the contract and fraud interwoven with the breach of contract. *Public Service Enterprise Group, Inc v Philadelphia Elec Co,* 722 F. Supp 184, 201 (D NJ, 1989). With respect to the latter kind of fraud, the misrepresentations relate to the breaching party's performance of the contract and do not give rise to an independent cause of [***11] action in tort.

> Such fraud is not extraneous to the contractual dispute among the parties, but is instead but another thread in the fabric of [the] plaintiffs' contract claim. . . . [It] is undergirded by factual allegations identical to those supporting their breach of contract counts. . . . This fraud did not induce the plaintiffs to enter into the original agreement nor did it induce them to enter into additional undertakings. It did not cause harm to the plaintiffs distinct from those caused by the breach of contract . . . . [Id.]

See also *Theuerkauf v United Vaccines Division of Harlan Sprague* Dawley, Inc, 821 F. Supp 1238, 1241-1242, n 1 (WD Mich, 1993) (declining to address, but recognizing as distinct, the issue whether the economic loss doctrine applies under Michigan law to a claim of fraud in the inducement [*374] arising independent of a contract); *Serina v Albertson's, Inc,* 744 F. Supp 1113,

1118 (MD Fla, 1990) (adopting the holding in Public Service Enterprise, supra).

C

Plaintiff asserts that the UCC explicitly preserves its right to maintain a common-law [**546] fraud action independent of its contractual claims, citing MCL 440.1103; MSA 19.1103: [***12]

> Unless displaced by the particular provisions of this act, the principles of law and equity, including the law merchant and the law relative to capacity to contract, principal and agent, estoppel, fraud, misrepresentation, duress, coercion, mistake, bankruptcy, or other validating or invalidating cause shall supplement its provisions.

Plaintiff's position, however, only begs the question before us now. The provision cited by plaintiff merely keeps intact those areas of the common law not superseded by specific provisions of the UCC. The body of common law sought to be preserved in this provision is the same body of law in which the economic loss doctrine arose. Although the Supreme Court's discussion of the economic loss doctrine in *Neibarger* was linked closely to the UCC context of the case, the doctrine is not limited to the UCC. Thus, the issue remains whether, even assuming that the law of fraud remains unchanged, plaintiff may pursue a fraud claim under the economic loss doctrine in light of its contractual remedies. We hold that plaintiff may only pursue a claim for fraud in the inducement extraneous to the alleged breach of contract.

Our holding heeds the Supreme [***13] Court's admonition to avoid confusing contract and tort law. [*375] *Neibarger, supra* at 529. The danger of allowing contract law to "'drown in a sea of tort'" exists only where fraud and breach of contract claims are factually indistinguishable. Id. at 528. However, a claim of fraud in the inducement, by definition, redresses misrepresentations that induce the buyer to enter into a contract but that do not in themselves constitute contract or warranty terms subsequently breached by the seller.

D

Having determined the proper analytical framework for evaluating plaintiff's fraud claim, we now turn to the facts of this case. Our task is to decide whether plaintiff's fraud claim is viable apart from its contractual claims such that the restrictive four-year limitation period of the UCC does not apply. To that end, we must look to the four corners of plaintiff's complaint, accept all factual allegations as true, and determine whether the fraud claim falls outside the ambit of the economic loss doctrine. We hold that it does not. The fraudulent representations alleged by plaintiff concern the quality and characteristics of the software system sold by defendants. These representations are [***14] indistinguishable from the terms of the contract and warranty that plaintiff alleges were breached. Plaintiff fails to allege any wrongdoing by defendants independent of defendants' breach of contract and warranty. [3] Because plaintiff's allegations of fraud are not extraneous to the contractual dispute, plaintiff is restricted to its contractual remedies under the UCC. The circuit court's dismissal of plaintiff's fraud claim was proper.

> 3 We also are influenced by the lack of specificity in plaintiff's fraud claims. Claims of fraud must be specifically pleaded. *Zimmerman v Merrill Lynch, Pierce, Fenner & Smith, Inc,* 151 Mich. App. 566, 574; 391 N.W.2d 353 (1986).

[*376] III

Our analysis does not end with the application of the economic loss doctrine to plaintiff's claim. Plaintiff also challenges the application of the UCC statute of limitation to its remaining contract claims. Specifically, plaintiff claims that the circuit court improperly made findings of fact regarding the date on which its contract with [***15] defendants was complete and its contract claims accrued.

The UCC provides a four-year limitation period for actions for breach of contract. MCL 440.2725(1); MSA 19.2725(1). The accrual date is defined as follows:

> A cause of action accrues when the breach occurs, regardless of the aggrieved party's lack of knowledge of the breach. A breach of warranty occurs when tender of delivery is made, except that where a warranty explicitly extends to future performance of the goods and discovery of the breach must await the time of such performance the cause of action accrues when the breach is or should have been discovered. [**547] [MCL 440.2725(2); MSA 19.2725(2).]

"Tender of delivery requires that the seller put and hold conforming goods at the buyer's disposition and give the buyer any notification reasonably necessary to enable him to take delivery." MCL 440.2503(1); MSA 19.2503(1). In the sale of machinery, the seller typically must complete the machine and tender performance

209 Mich. App. 365, *; 532 N.W.2d 541, **;
1995 Mich. App. LEXIS 103, ***; 26 U.C.C. Rep. Serv. 2d (Callaghan) 703

consistent with the contract. See *Detroit Power Screwdriver Co v Ladney,* 25 Mich. App. 478; 181 N.W.2d 828 (1970). Under the UCC statute of limitation, plaintiff's contractual claims are barred if they [***16] accrued before July 20, 1988.

When reviewing a motion for summary disposition [*377] under MCR 2.116(C)(7), a court must accept as true the plaintiff's well-pleaded allegations and construe them in the plaintiff's favor. *Harris v Allen Park,* 193 Mich. App. 103, 106; 483 N.W.2d 434 (1992). The court must look to the pleadings, affidavits, or other documentary evidence to see if there is a genuine issue of material fact. If no facts are in dispute, whether the plaintiff's claim is barred by the statute of limitations is a question for the court as a matter of law. Id. However, if a material factual dispute exists such that factual development could provide a basis for recovery, summary disposition is inappropriate. See *Marrero v McDonnell Douglas Capital Corp,* 200 Mich. App. 438, 441; 505 N.W.2d 275 (1993).

The record in this case reveals a material factual dispute. Plaintiff submitted an affidavit of its vice president, Gene Legault, stating that the original software system was to include programs capable of doing inventory and shop order processing and that these were not programmed until at least November 1988. Defendant Wulffenstein submitted an affidavit stating that a full [***17] software system was delivered, accepted, and paid for before May 13, 1988. The circuit court's resolution of this conflict entailed elements of fact finding. For example, it questioned the credibility of Legault's statement that part of the system was not installed in November 1988 in light of defendant Wulffenstein's statement that modifications to the system after May 1988 were billed, accepted, and paid for separately under oral contract. The circuit court's role was simply to take Legault's affidavit at face value. It did not do so.

Defendants nevertheless argue that the conflict between the affidavits is immaterial because it is undisputed that plaintiff tendered full payment in May 1988, and the contract defined this as acceptance [*378] and completion. Defendants read too much into the terms as defined in the contract. The provision invoked by them merely states that plaintiff's last payment was due upon completion of installation. We find nothing in the language to suggest that full payment was to be deemed tantamount to completion of the contract. Defendants' interpretation would penalize the purchaser who prepays and would reward delay.

The circuit court erred in granting defendants' [***18] motion for summary disposition with respect to plaintiff's contractual claims.

Affirmed in part, reversed in part, and remanded.

/s/ Michael J. Kelly

/s/ E. Thomas Fitzgerald

/s/ Edward R. Post

LEXSEE

**In re TRADE PARTNERS, INC. INVESTORS LITIGATION.**

**File No. 1:07-MD-1846, ALL CASES**

**UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION**

**2008 U.S. Dist. LEXIS 66464**

**August 15, 2008, Decided**
**August 15, 2008, Filed**

**SUBSEQUENT HISTORY:** Partial summary judgment granted by, in part, Partial summary judgment denied by, in part In re Trade Partners, Inc., 2008 U.S. Dist. LEXIS 85551 (W.D. Mich., Aug. 22, 2008)

**PRIOR HISTORY:** In re Trade Partners, Inc., 2008 U.S. Dist. LEXIS 53352 (W.D. Mich., July 11, 2008)

**JUDGES:** [*1] ROBERT HOLMES BELL, UNITED STATES DISTRICT JUDGE.

**OPINION BY:** ROBERT HOLMES BELL

**OPINION**

**OPINION REGARDING MACATAWA'S AND THE MAIERS' MOTIONS FOR PARTIAL SUMMARY JUDGMENT**

This matter is before the Court on three motions. First, Macatawa Bank and Macatawa Bank Corporation (collectively "Macatawa") move for partial dismissal and/or summary judgment as to several of Plaintiffs' claims. (Dkt. No. 140, [1] Macatawa's Mot. for Partial Summ. J.) Second, in the *Adamson v. Macatawa* case, Plaintiffs Ronald and Rebecca Maier move for partial summary judgment on their breach of contract claim. (File No. 1:07-CV-750, Dkt. No. 104, Maiers' Mot. for Partial Summ. J.) Third, Plaintiffs move for the declaration of Brian Downs to be disregarded. [2] (Dkt. No. 227, Pls.' Mot. to Strike.) On July 28, 2008, the Court heard oral argument on these motions. For the reasons that follow, Macatawa's motion for partial dismissal and/or summary judgment will be granted in part and denied in part, Plaintiffs Ronald and Rebecca Maier's motion for partial summary judgment on their breach of contract claim will be denied, and Plaintiffs' motion for the declaration of Brian Downs to be disregarded will be denied as moot.

1 Unless otherwise indicated, [*2] all docket numbers in this opinion refer to the docket for File No. 1:07-MD-1846.

2 Plaintiffs' motion for the declaration of Brian Downs to be disregarded was originally filed as a motion to strike Macatawa's motion for partial dismissal and/or summary judgment or, in the alternative, to disregard the declaration of Brian Downs. On July 14, 2008, the Court issued a memorandum opinion and order that denied Plaintiffs' motion to strike Macatawa's motion for partial dismissal and/or summary judgment and indicated that the motion to disregard the declaration of Brian Downs would be addressed with the substance of Macatawa's motion for partial summary judgment. (Dkt. No. 303, Mem. Op. re Decl. of Brian Downs.)

**I. Background**

**A. Factual Background**

This MDL action arises from the sale of viatical settlements by Trade Partners Inc. ("TPI") between 1996 and 2003. Defendant Macatawa Bank is a member bank of Defendant Macatawa Bank Corporation. Macatawa Bank is the successor by merger to Grand Bank. Grand Bank provided certain banking services related to TPI's viatical settlements. Many of the events relevant to these motions occurred prior to the merger; however, consistent with the Court's practice [*3] in earlier opinions in this MDL action, the Court refers to Grand Bank as Macatawa. (*E.g.,* Dkt. No. 25, 11/06/2007 Op. 2 n.2; Dkt. No. 211, 04/15/2008 Op. 2 n.2.)

Plaintiffs Ronald and Rebecca Maier are residents of Yukon, Oklahoma. Plaintiffs Maiers allege that they made three investments with TPI totaling $ 34,200. (File

No. 1:07-CV-750, Dkt. No. 101, *Adamson* Pls.' Sixth Am. Compl., App. 4, TPI Investor Spreadsheet 3.) Plaintiffs Maiers made their initial investment with TPI in March of 1999.

**B. Procedural Background**

On June 26, 2007, the Judicial Panel on Multidistrict Litigation transferred four cases involving individuals who had invested with TPI then pending outside of the Western District of Michigan to be consolidated with *Jenkins v. Macatawa,* which was already pending in the Western District of Michigan. (*See* 11/06/2007 Op. 2-3 (detailing the procedural history of the transferred cases).) On January 22, 2008, the Court issued its initial case management order for this MDL action, which provided for the parties to file global dispositive motions by March 3, 2008. (Dkt. No. 97, Initial Case Mgmt. Order P 7.b.) Two of the global dispositive motions that have been filed are Macatawa's [*4] motion for partial dismissal and/or summary judgment as to several of Plaintiffs' claims and Plaintiffs Maiers' motion for partial summary judgment on their breach of contract claim. On July 11, 2008, the Court entered an opinion and order that determined that all claims, except the state securities law claims, are governed by Michigan law. (Dkt. Nos. 301-02, Op. re Choice-of-Law & Order re Choice-of-Law.) Although Macatawa's motion involves the state securities law claims, Macatawa's motion only addresses the state securities law claims that are asserted under the Michigan Uniform Securities Act ("MUSA"). Therefore, all of the substantive issues presented by Macatawa's and Plaintiffs Maiers' motions are governed by Michigan law.

**II. Summary Judgment Standard**

Under Rule 56(c) of the Federal Rules of Civil Procedure, summary judgment is proper if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. [3] In evaluating a motion for summary judgment the court must look beyond the pleadings and assess the proof to determine whether there is a genuine need for trial. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 587, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986). [*5] If the moving party carries its burden of showing there is an absence of evidence to support a claim, then the nonmoving party must demonstrate by affidavits, depositions, answers to interrogatories, and admissions on file, that there is a genuine issue of material fact for trial. *Celotex Corp. v. Catrett,* 477 U.S. 317, 324-25, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986).

3 Macatawa's motion asks the Court to resolve issues under both Rule 12(b)(6) as a motion to dismiss for failure to state a claim and under Rule 56 as a motion for summary judgment. As Macatawa moved for summary judgment, the Court is not converting the motion to a motion for summary judgment. *Cf.* Fed. R. Civ. P. 12(d). If the Court were converting the motion, then, "whether notice of conversion of a motion to dismiss to one for summary judgment by the court to the opposing party is necessary depends upon the facts and circumstances of each case." *Salehpour v. Univ. of Tenn.,* 159 F.3d 199, 204 (6th Cir. 1998) (citing *Dayco Corp. v. Goodyear Tire & Rubber Co.,* 523 F.2d 389, 393 (6th Cir. 1975)). "Where one party is likely to be surprised by the proceedings, notice is required." *Id.* (citing *Dayco Corp.,* 523 F.2d at 393). Macatawa filed its motion as both [*6] a motion to dismiss and a motion for summary judgment, so Plaintiffs had notice Macatawa was seeking to have the Court resolve the issues presented on summary judgment. Moreover, Plaintiffs responded to Macatawa's motion with over four hundred pages of material (Dkt. No. 221, Farrell Aff., Exs. 1-53), indicating that they did in fact have a reasonable opportunity to respond. *Id.* at 204 (finding that a plaintiff had a reasonable opportunity to respond when he had time to respond and had in fact responded with over two hundred pages of material). Lastly, at the hearing on this motion the only issue on which Plaintiffs even suggested a possibility of prejudice if the Court resolved the issue on summary judgment was with respect to Macatawa's arguments for summary judgment on the MUSA claims. However, Plaintiffs' contentions of prejudice are moot, because as the Court explains in Section III.F.1 - *Seller under the MUSA,* Macatawa is not entitled to summary judgment on Plaintiffs' claims that Macatawa was the seller of unregistered securities. There is not an issue of prejudice with respect to the Court's granting of summary judgment on the MUSA claims that Macatawa was a person who controlled [*7] a seller of unregistered securities, *see infra* Section III.F.2 - *A person who controls a seller under the MUSA,* because Plaintiffs did not respond to that argument under Rule 12(b)(6) or 56.

In considering a motion for summary judgment, the court must construe the evidence and draw all reasonable inferences in favor of the nonmoving party. *Minges Creek, L.L.C. v. Royal Ins. Co. of Am.,* 442 F.3d 953, 955-56 (6th Cir. 2006) (citing *Matsushita,* 475 U.S. at 587). Nevertheless, the mere existence of a scintilla of evidence in support of the nonmoving party's position is not sufficient to create a genuine issue of material fact.

*Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). The proper inquiry is whether the evidence is such that a reasonable jury could return a verdict for the nonmoving party. *Id.; see generally, Street v. J.C. Bradford & Co.*, 886 F.2d 1472, 1476-80 (6th Cir. 1989).

When the moving party has the burden of proof, however, a somewhat different standard applies. "'[W]here the moving party has the burden - the plaintiff on a claim for relief or defendant on an affirmative defense - his showing must be sufficient for the court to hold that no reasonable trier of fact [*8] could find other than for the moving party.'" *Calderone v. United States*, 799 F.2d 254, 259 (6th Cir. 1986) (quoting W. Schwarzer, *Summary Judgment Under the Federal Rules: Defining Genuine Issues of Material Fact*, 99 F.R.D. 465, 487-88 (1984)). "[I]f the moving party also bears the burden of persuasion at trial, the moving party's initial summary judgment burden is 'higher in that it must show that the record contains evidence satisfying the burden of persuasion and that the evidence is so powerful that no reasonable jury would be free to disbelieve it.'" *Arnett v. Myers*, 281 F.3d 552, 561 (6th Cir. 2002) (quoting 11 James Wm. Moore, et al., *Moore's Federal Practice* § 56.13[1], at 56-138 (3d ed. 2000)). Thus, "[s]ummary judgment in favor of the party with the burden of persuasion . . . is inappropriate when the evidence is susceptible of different interpretations or inferences by the trier of fact." *Hunt v. Cromartie*, 526 U.S. 541, 553, 119 S. Ct. 1545, 143 L. Ed. 2d 731 (1999).

**III. Analysis**

**A. Statute of limitations for the breach of contract claims**

Macatawa moves for summary judgment on the breach of contract claims based on the breach of contract claims being barred by the statute of limitations. Under Michigan law, [*9] the statute of limitations for breach of contract actions is six years. M.C.L.A. § 600.5807(8) (West 2008). Plaintiffs contend that their breach of contract claims are not governed by the statute of limitations in M.C.L. § 600.5807(8), but by the statute of limitations in M.C.L. § 600.5855. Michigan Compiled Laws § 600.5855 provides a two-year statute of limitations that runs from the date that the person entitled to sue discovers, or should have discovered, the claim if the person liable for the claim "fraudulently conceals the existence of the claim or the identity of any person who is liable for the claim from the knowledge of the person entitled to sue on the claim . . . ." M.C.L.A. § 600.5855 (West 2008).

> As a general rule, for fraudulent concealment to postpone the running of the period of limitation, the fraud must be manifested by an affirmative act or misrepresentation. An exception to this rule is that there is an affirmative duty to disclose where the parties are in a fiduciary relationship.

*Brownell v. Garber*, 199 Mich. App. 519, 527, 503 N.W.2d 81 (1993) (quoting *Lumber Village, Inc. v. Siegler*, 135 Mich. App. 685, 694-95, 355 N.W.2d 654 (1984)). Plaintiffs contend that [*10] they do not need to show an affirmative act or misrepresentation because of Macatawa's fiduciary duty to Plaintiffs as an escrow agent. Assuming that the affirmative act or misrepresentation requirement is inapplicable because Macatawa and Plaintiffs were in a fiduciary relationship, Plaintiffs still have the burden of establishing that Macatawa fraudulently concealed the breach of contract. *Id.* at 531 (acknowledging that the defendant owed a fiduciary duty to the plaintiff and then stating that the "essential point is that in order to be within the statutory period of limitation plaintiff must prove that defendant fraudulently concealed the existence of the cause of action . . . ."). Plaintiffs have not identified any evidence supporting the contention that Macatawa fraudulently concealed the breach of contract from Plaintiffs. (Dkt. No. 219, Pls.' Resp. in Opp'n 33-34; Dkt. No. 220, *Elkins* Pls.' Resp. in Opp'n (making no reference to Macatawa's statute of limitations argument).) Hence, as a matter of summary judgment, Macatawa did not fraudulently conceal the breach of contract from Plaintiffs. In the absence of fraudulent concealment of the claim from Plaintiffs, M.C.L. § 600.5855 [*11] is inapplicable.

As Plaintiffs' breach of contract claims are governed by M.C.L. § 600.5807(8), the Court must determine the application of M.C.L. § 600.5807(8). "A claim accrues, for purposes of the statute of limitations, when suit may be brought." *AFSCME, AFL-CIO, Mich. Council 25 and Local 1416 v. Highland Park Sch. Dist. Bd. of Educ.*, 457 Mich. 74, 90, 577 N.W.2d 79 (1998) (plurality opinion) (citing *Harris v. Allen Park*, 193 Mich. App. 103, 106, 483 N.W.2d 434 (1992), and *Smith v. Treasury Dep't*, 163 Mich. App. 179, 183, 414 N.W.2d 374 (1987)). "For contract actions, the limitation period generally begins to run on the date of the contract breach." *Id.* (plurality opinion) (citing *Harris*, 193 Mich. App. at 106).

Plaintiffs' complaints allege that Macatawa breached its contractual obligations, but do not identify what contract term was breached. (File No. 1:03-CV-321, Dkt. No. 916, *Jenkins* Pls.' Second Am. Consol. Class Action Compl. PP 63-67; File No. 1:07-CV-738, Dkt. No. 114,

*Bailey* Pls.' Fourth Am. Compl. PP 45-48; *Adamson* Pls.' Sixth Am. Compl. PP 45-48; File No. 1:07-CV-751, Dkt. No. 1, *Elkins* Pls.' Compl. PP 26-29; File No. 1:07-CV-775, Dkt. No. 103, *Myers* Pls.' Third Am. [*12] Compl. PP 45-48.) In the portion of Macatawa's motion for summary judgment that addresses the substance of Plaintiffs' breach of contract claims, Macatawa contends that the alleged breach was a failure to escrow funds sufficient to pay the premiums for the life insurance policies upon which TPI's viatical settlements were based. Plaintiffs' response on the statute of limitations issue does not contravene this contention; however, in response to Macatawa's arguments on the substance of the breach of contract claims, Plaintiffs argue that in addition to the escrow based breach, there was a breach of contract in relation to verification of the insurance documents. As the Court explains in Section III.B.2 - *Verification of insurance policy documents for plaintiffs who signed an escrow agreement with Macatawa,* Macatawa is entitled to summary judgment on Plaintiffs' contention that there was a breach of contract related to the verification of the insurance documents. Thus, the statute of limitations for the breach of contract claims must be assessed based on the alleged failure to escrow funds sufficient to pay the premiums of the insurance policies underlying the viatical settlements.

Plaintiffs [*13] contend that the breach did not occur on the date of investment, but on the date Macatawa released funds to TPI in breach of Macatawa's contractual obligations. Macatawa contends that for the purposes of the statute of limitations, the time of any breach of contract occurred when each plaintiff invested. Macatawa's contention fails because there could not have been a breach of the type alleged by Plaintiffs until Macatawa dispersed a plaintiff's funds to TPI. Even if Macatawa was not holding a plaintiff's funds solely because of Macatawa's contractual obligations to that plaintiff, Macatawa was still acting in conformity with the contractual obligations alleged by Plaintiffs until it dispersed funds in a manner contrary to those contractual obligations. Therefore, the six-year statute of limitations for the breach of contract claims, M.C.L. § 600.5807(8), begins to run on the date that Macatawa dispersed funds in a manner contrary to its contractual obligations to escrow funds sufficient to pay insurance policy premiums.

A putative class action was filed on behalf of Plaintiffs, so the Court must determine if the statute of limitations was tolled for any period of time. Because Michigan [*14] law supplies the applicable statute of limitations, Michigan's tolling principles also govern. *Wyser-Pratte Mgmt. Co., Inc. v. Telxon Corp.*, 413 F.3d 553, 567 (6th Cir. 2005) (citing *Hemenway v. Peabody Coal Co.*, 159 F.3d 255, 265 (7th Cir. 1998)). Under Michigan law, the statute of limitations is tolled from the filing of a putative class action until the denial of class certification. *Warren Consol. Schs. v. W.R. Grace & Co.*, 205 Mich. App. 580, 585-86, 518 N.W.2d 508 (1994) (applying the holding of *Crown, Cork & Seal Co., Inc. v. Parker*, 462 U.S. 345, 353-54, 103 S. Ct. 2392, 76 L. Ed. 2d 628 (1983) to a state court plaintiff where there was a previous federal class action); *see also* MCR 3.501(F)(1), (F)(2)(c) (providing tolling for state court class actions). A class action complaint was filed in *Jenkins v. Macatawa* on May 9, 2003. (File No. 1:03-CV-321, Dkt. No. 1, *Jenkins* Pls.' Class Action Compl.) The Court denied class certification on November 8, 2006. (File No. 1:03-CV-321, Dkt. No. 676, 11/08/2006 Order.) Macatawa is entitled to summary judgment as to any breach of contract claim by a plaintiff for whom more than six years passed between Macatawa dispersing funds in a manner contrary to its contractual obligations [*15] to escrow funds sufficient to pay insurance policy premiums and the plaintiff filing a lawsuit alleging breach of contract against Macatawa, after tolling the statute of limitations from May 9, 2003, until November 8, 2006. [4]

4 In accordance with Macatawa's motion being on the global dispositive issues, Macatawa has not moved as to individual plaintiffs, but as to categories of plaintiffs. Macatawa has indicated that it will move for summary judgment as to individual plaintiffs after the Court issues its opinion on this motion for partial summary judgment based on the categories for which the Court grants summary judgment in this opinion. No party has contended that there are not plaintiffs in each of the categories addressed in this motion, so there is no question that each category addressed by this opinion presents an actual dispute of fact or law between parties to this MDL action.

**B. Substance of the Breach of Contract Claims**

Under Michigan law, to prevail on a breach of contract claim a plaintiff must prove: (1) the existence of a contract, (2) the terms of the contract, (3) that the defendant breached the contract, and (4) that the breach caused the plaintiff's injury. *Webster v. Edward D. Jones & Co., L.P.*, 197 F.3d 815, 819 (6th Cir. 1999) [*16] (applying Michigan law). Macatawa moves for summary judgment as to Plaintiffs' breach of contract claims.

**1. Plaintiffs who did not have a contract with Macatawa**

Macatawa moves for summary judgment on the breach of contract claims of plaintiffs who did not have a

contract with Macatawa. "To state a breach of contract claim under Michigan law, a plaintiff must first establish the elements of a valid contract." *In re Brown*, 342 F.3d 620, 628 (6th Cir. 2003) (citing *Pawlak v. Redox Corp.*, 182 Mich. App. 758, 765, 453 N.W.2d 304 (1990)) (applying Michigan law). The elements of a valid contract are: "parties competent to contract, a proper subject-matter, a legal consideration, mutuality of agreement, and mutuality of obligation." *Detroit Trust Co. v. Struggles*, 289 Mich. 595, 599, 286 N.W. 844 (1939) (citing *John v. Douglas*, 281 Mich. 247, 274 N.W. 780 (1937)). Macatawa contends that the following types of plaintiffs did not have a contract with Macatawa: plaintiffs who invested with TPI before Macatawa had a relationship with TPI, plaintiffs who invested in TPI's Sojkara, IWM, and inventory loan products, and plaintiffs who purchased TPI's viatical settlements from a third-party.

Plaintiffs [*17] did not respond with respect to plaintiffs who invested with TPI before Macatawa had a relationship with TPI, therefore Macatawa is entitled to summary judgment as to the breach of contract claims of plaintiffs who invested with TPI before Macatawa had a relationship with TPI.

As to TPI's Sojkara, IWM, and inventory loan products, only the *Elkins* Plaintiffs acknowledge this part of Macatawa's motion. (*Elkins* Pls.' Resp. in Opp'n 5 & n.3.) However, the *Elkins* Plaintiffs simply acknowledge that one investment made by one of the *Elkins* Plaintiffs was an inventory loan, without offering any analysis of how such an investment supports a breach of contract claim against Macatawa. (*Id.*) As Plaintiffs have not articulated the basis on which plaintiffs who invested in TPI's Sojkara, IWM, and inventory loan products have a breach of contract claim against Macatawa, Macatawa is entitled to summary judgment as to the breach of contract claims of plaintiffs who invested in TPI's Sojkara, IWM, and inventory loan products.

With respect to plaintiffs who purchased TPI's viatical settlements from a third-party, Plaintiffs contend that such plaintiffs succeed to the contractual rights of the original [*18] purchaser. (Pls.' Resp. in Opp'n 3 n.3.) Macatawa contends in its reply that such plaintiffs do not succeed to the contractual rights of the original purchaser. (Dkt. No. 277, Macatawa's Reply in Supp. 6.) Neither Macatawa nor Plaintiffs have cited any legal authority in support of their respective positions about third-party purchasers. Under Michigan contract law, "rights can be assigned unless the assignment is clearly restricted." *Burkhardt v. Bailey*, 260 Mich. App. 636, 653, 680 N.W.2d 453 (2004) (citing Calamari & Perillo, *Contracts* § 18-10, at 735 (3d ed.)). "An assignee stands in the position of the assignor, possessing the same rights and being subject to the same defenses." *Id.* (citing *Nichols v. Lee*, 10 Mich. 526, 528-29 (1862)). No party has identified any language in the agreements signed by the individuals who invested through TPI that would prohibit such investors from assigning their rights to a third-party. Therefore, Macatawa is not entitled to summary judgment as to the breach of contract claims of plaintiffs who purchased TPI's viatical settlements from a third-party.

**2. Verification of insurance policy documents for plaintiffs who signed an escrow agreement with** [*19] **Macatawa**

In order to successfully assert a breach of contract claim, the plaintiff must allege that the defendant's breach caused the plaintiff's injury. *Webster*, 197 F.3d at 819. Macatawa initially moved for summary judgment as to whether it had breached the escrow agreements. In response to Macatawa's motion, Plaintiffs offered two different theories of Macatawa's breach: (1) failure to verify the insurance documents, and (2) failure to escrow funds for payment of the insurance policy premiums. The Court will first address Plaintiffs' theory that Macatawa failed to verify the insurance documents. Plaintiffs contend that Macatawa was required to verify that the insurance documents met three requirements: (1) that the documents Macatawa received have been executed by a designated representative of the insurer, (2) that the owner of the policy had been changed, and (3) that the beneficiary of the policy had been irrevocably changed. Who was to be designated beneficiary and owner varied throughout Macatawa's relationship with TPI, but Plaintiffs' contention is that for each investor, there were certain changes in the insurance documents that Macatawa was to verify had taken place before [*20] releasing funds to TPI. Plaintiffs contend that in most instances Macatawa failed to verify these changes. Macatawa responds that the level of verification required was less than what Plaintiffs contend was required. The Court need not address what level of verification was required and whether Macatawa performed that level of verification, because Plaintiffs' insufficient verification breach of contract theory fails as a matter of law even if Macatawa did not perform the contractually required level of verification.

Plaintiffs contend that if Macatawa had properly verified all of the insurance documents, then Macatawa would not have released the investors' funds to TPI and instead would have returned the investors' funds to the investor. However, Plaintiffs do not allege that any of TPI's viatical settlements failed because the owner or beneficiary had not been changed. "The general rule in breach of contract actions is that damages recoverable for a breach of contract are those arising naturally from the breach or those which were within the parties'

contemplation at the time of contracting." *Harris v. Citizens Ins. Co.*, 141 Mich. App. 110, 112, 366 N.W.2d 11 (1983) (citing *Kewin v. Mass. Mut. Life Ins. Co.*, 409 Mich. 401, 295 N.W.2d 50 (1980), [*21] and *Hadley v. Baxendale,* 9 Exch. 341, 156 Eng. Rep. 145 (1854)). The damages Plaintiffs seek to recover for do not arise naturally from any failure by Macatawa to properly verify the insurance documents, but from an alleged failure of Macatawa to escrow funds sufficient to pay the insurance policy premiums. *Cf. Corl v. Huron Castings, Inc.*, 450 Mich. 620, 625-26, 544 N.W.2d 278 (1996) ("[T]he goal in contract law is not to punish the breaching party, but to make the nonbreaching party whole."). As Plaintiffs cannot show that any damages arise from Macatawa's failure to verify the insurance documents, Plaintiffs' cannot sustain a breach of contract claim based on Macatawa having breached the escrow agreements by not verifying the insurance documents. Therefore, Macatawa is entitled to summary judgment as to Plaintiffs' breach of contract claims that are premised on a failure by Macatawa to verify insurance documents.

**3. Escrow of premiums for plaintiffs who signed an escrow agreement with Macatawa**

The Court must next address Plaintiffs' second breach of contract theory, that Macatawa breached its obligation to escrow funds for the payment of insurance policy premiums. The interpretation [*22] of contracts is a question of law. *Wilkie v. Auto-Owners Ins. Co.*, 469 Mich. 41, 47, 664 N.W.2d 776 (2003); *Archambo v. Lawyers Title Ins. Corp.*, 466 Mich. 402, 408, 646 N.W.2d 170 (2002). The contracts which the Court must interpret are escrow agreements, and under Michigan law,

> Where a person assumes to and does act as the depositary in escrow, he is absolutely bound by the terms and conditions of the deposit and charged with a strict execution of the duties voluntarily assumed. He is held to strict compliance with the terms of the escrow agreement. If he violates instructions or acts negligently, he is ordinarily liable for any loss occasioned by his breach of duty.

*Smith v. First Nat'l Bank & Trust Co. of Sturgis*, 177 Mich. App. 264, 270-271, 440 N.W.2d 915 (1989).

**a. Plaintiffs with escrow agreements with a revision date prior to October 15, 1998**

Macatawa contends that it did not have an obligation to escrow funds for the payment of insurance policy premiums for investors with an escrow agreement with a revision date prior to October 15, 1998. Plaintiffs contend that Macatawa had an obligation to escrow funds for the payment of premiums for investors with escrow agreements that have [*23] a revision date prior to October 15, 1998, but do not contend that this obligation arose from the text of the escrow agreements. (Pls.' Resp. in Opp'n 25; *Elkins* Pls.' Resp. in Opp'n 5 ("Before Ocotober 15, 1998, the [Escrow] Agreement did not specifically mention the obligation to escrow funds to pay premiums.").) Rather, Plaintiffs contend that Macatawa had an obligation to escrow funds for the payment of premiums based on three documents: (1) a June 4, 1997, letter from Christine Zmudka at TPI to Richard Deardorff at Macatawa (Farrell Aff., [5] Ex. 31, Letter from Christine Zmudka, Principal, TPI, to Richard Deardorff, Grand Bank (June 4, 1997)), (2) a document titled "Trade Partners, Inc. Premium Reserve Account Procedures Outline" (Farrell Aff., Ex. 31, Premium Reserve Account Procedures Outline), and (3) a letter dated June 12, 1996, from Macatawa to TPI, which the parties agree should actually be dated June 12, 1997 (the "June 12, 1997, letter") (Farrell Aff., Ex. 32, Letter from Richard Deardorff, Vice President & Trust Officer, Grand Bank, to Thomas Smith and Christine Zmudka, TPI (June 12, 1996)). Plaintiffs contend that these documents imposed on Macatawa an obligation to [*24] ensure that the Premium Reserve Account had funds equal to one-and-one-half times the premium payments for the expected life of each viator. Plaintiffs further contend that the investors were the intended beneficiaries of these agreements.

> 5 At oral argument on this motion Macatawa raised several questions about the Farrell Affidavit. The affiant of the Farrell Affidavit is Thomas Farrell, who appeared on behalf of Plaintiffs at the oral argument on this motion and who represents most of the plaintiffs in the cases comprising this MDL action. While it does not alter the outcome of this motion, the Court notes that it is novel and highly unusual for an attorney who represents parties in the lawsuit in which the affidavit is submitted to submit an affidavit of the type offered by Mr. Farrell. *See* 3 Am. Jur. 2d *Affidavits* § 4 (2008) ("[T]he appropriate party to attest to the facts is the plaintiff himself, not the plaintiff's attorney . . . ."). Although certain procedural contexts do necessitate that an attorney who represents parties in a lawsuit file an affidavit (*e.g.,* Dkt. No. 192, Macatawa's Br. in Supp of Mot. to Dismiss Teig and Goolsbay, Ex. A, Ulm Aff. (affidavit of an attorney [*25] for Macatawa regarding the failure of a plaintiff to attend her deposition)), Mr. Farrell's affidavit offers analysis of documents that go to the merits

> of Plaintiffs' claims. Mr. Farrell's affidavit places him in the odd position of putting his integrity before the Court as to the veracity of certain factual assertions made by Plaintiffs.

"Before there can be a legally enforceable obligation there must be an offer and an acceptance." *Mathieu v. Wubbe,* 330 Mich. 408, 412, 47 N.W.2d 670 (1951). The June 4, 1997, letter from Christina Zmudka and the document titled "Trade Partners, Inc. Premium Reserve Account Procedures Outline," which was enclosed with Ms. Zmudka's letter, both originated from TPI. Assuming that the June 4, 1997, letter and the enclosure were an offer to contract from TPI, Plaintiffs have not provided any evidence that Macatawa signed or otherwise affirmatively accepted TPI's offer. Plaintiffs contend that the June 12, 1997, letter was an acceptance of the June 4, 1997, offer, but there is no language in the June 12, 1997, letter that supports this position. The June 12, 1997, letter does not acknowledge or reference the June 4, 1997, letter or the enclosure to the [*26] June 4, 1997, letter. (Letter from Richard Deardorff, Vice President & Trust Officer, Grand Bank, to Thomas Smith and Christine Zmudka, TPI (June 12, 1996).) In the absence of any reference to the June 4, 1997, letter or enclosure, the June 12, 1997, letter cannot be construed as an acceptance. Moreover, "'any material departure from the terms of an offer invalidates the offer as made, and results in a counter proposition, which, unless accepted, cannot be enforced.'" *Harper Bldg. Co. v. Kaplan,* 332 Mich. 651, 655, 52 N.W.2d 536 (1952) (quoting *Carrollton Acceptance Co. v. Ruggles Motor Truck Co.,* 253 Mich. 1, 5, 234 N.W. 134 (1931)). The June 12, 1997, letter introduces the following fee structure:

> [Macatawa] will charge an annual fee of $ 500, which will be billed directly to Trade Partners. We will also receive a 12b-1 fee of .25% directly from the money market fund (prospectus included).

(*Id.*) Even if there was other language in the June 12, 1997, letter that indicated that the letter was intended as an acceptance, the addition of the fee structure in the June 12, 1997, letter converted the June 12, 1997, letter into a counteroffer.

The June 12, 1997, was an offer from Macatawa that [*27] was accepted by TPI. The June 12, 1997, letter states that "If the terms of this letter are agreeable to you, please sign where indicated at the bottom of this letter." (Letter from Richard Deardorff, Vice President & Trust Officer, Grand Bank, to Thomas Smith and Christine Zmudka, TPI (June 12, 1996).) Thomas J. Smith and Christine M. Zmudka both signed the letter on behalf of TPI. (*Id.*) Hence, the June 12, 1997, letter constituted a contract between TPI and Macatawa. The June 12, 1997, letter provides in pertinent part that:

> This letter will outline the terms of the above relationship between the Trust Department and Trade Partners. [Macatawa] will receive funds from Trade Partners to pay insurance policy premiums. [Macatawa] will hold these funds in an interest bearing money market account, which is currently yielding 5.1%. Upon authorization from Trade Partners, [Macatawa] will send a check directly to the appropriate insurance company for payment of the designated policy's annual premium. [Macatawa] will then notify Trade Partners of the completed transaction.

(*Id.*) The June 12, 1997, letter indicates that TPI will provide Macatawa with the funds to be held for payment of insurance [*28] policy premiums. This is directly contrary to Plaintiffs' contention that after receiving the funds from an investor, Macatawa was obligated to withhold the portion of those funds that were necessary for the payment of insurance policy premiums. Most importantly, the terms of the June 12, 1997, letter do not require Macatawa to hold any funds in escrow. The June 12, 1997, makes no reference to the funds being held in escrow, thus Macatawa would not have had authority to withhold funds if TPI made a request for disbursement. *See Bell Bros. v. Bank One, Lafayette, N.A.,* 116 F.3d 1158, 1160 (7th Cir. 1997) ("Banks do not possess discretion over demand accounts. A bank is obliged to honor the instructions of the depositor and account-holder."). None of the three documents identified by Plaintiffs obligated Macatawa to escrow funds sufficient to pay insurance policy premiums.

The escrow agreements with revision dates prior to October 15, 1998, did not require Macatawa to escrow funds sufficient to pay insurance policy premiums. Additionally, the three documents identified by Plaintiffs do not impose an obligation on Macatawa to escrow funds sufficient to pay insurance policy premiums. Thus, [*29] there is no genuine issue of material fact as to Macatawa not having had an obligation to escrow funds sufficient to pay insurance policy premiums for escrow agreements with a revision date prior to October 15, 1998. Macatawa is entitled to summary judgment as to the breach of contract claims premised on Macatawa having had an obligation to escrow funds for the payment of insurance policy premiums for plaintiffs with

escrow agreements with a revision date prior to October 15, 1998.

**b. Plaintiffs with escrow agreements with a revision date of October 15, 1998, through March 1, 2000**

Macatawa contends that it is entitled to summary judgment with respect to the obligation to escrow funds for the payment of insurance policy premiums imposed by escrow agreements with revision dates of October 15, 1998, through March 1, 2000. [6] "'The cardinal rule in the interpretation of contracts is to ascertain the intention of the parties. To this rule all others are subordinate.'" *City of Grosse Pointe Park v. Mich. Mun. Liab. & Prop. Pool,* 473 Mich. 188, 197, 702 N.W.2d 106 (2005) (quoting *McIntosh v. Groomes,* 227 Mich. 215, 218, 198 N.W. 954 (1924)). The language of the parties "is the best way to determine [*30] what the parties intended." *Klapp v. United Ins. Group Agency, Inc.,* 468 Mich. 459, 476, 663 N.W.2d 447 (2003). "'A contract is said to be ambiguous when its words may reasonably be understood in different ways. . . . Yet if a contract, however inartfully worded or clumsily arranged, fairly admits of but one interpretation it may not be said to be ambiguous or, indeed, fatally unclear.'" *Farm Bureau Mut. Ins. Co. v. Nikkel,* 460 Mich. 558, 566, 596 N.W.2d 915 (1999) (quoting *Raska v. Farm Bureau Mut. Ins. Co.,* 412 Mich. 355, 362, 314 N.W.2d 440 (1982)).

> 6 Macatawa does not seek summary judgment with respect to the obligation to escrow funds for the payment of insurance policy premiums imposed by escrow agreement with revision dates after March 1, 2000.

The escrow agreements, starting with the October 15, 1998, revision, contain language related to the escrow of funds for the payment of insurance policy premiums. The October 15, 1998, revision of the escrow agreement provides in pertinent part:

> 3. Restricted Account. The Escrow Account is a restricted-access account, previously established with the Escrow Agent. It is hereby stated that Trade Partners shall not have access to Escrow Funds [*31] for any reason until the Escrow Agent receives the specified documents discussed in Section 4 of this Agreement and authorizes release of the Escrow Funds from the Escrow Account, a portion to Trade Partners and a portion to the Premium Reserve Account ("Premium Reserve Account") established by the Premium Escrow Agreement executed by Trade Partners and Escrow Agent on October 12, 1998.
>
> 4. Appointment of Escrow Agent. The parties hereto appoint The Grand Bank as Escrow Agent for the purpose of controlling the withdrawal of funds deposited herewith. . . . Release of Escrow Funds shall be at the sole discretion of the Escrow Agent.
>
> 5. Release of Funds. Escrow Agent will not authorize the release of Escrow Funds to Trade Partners, the viator, or any other third party until receipt of documents as set forth in Section 4 of this Agreement. Upon receipt, Escrow Agent shall permit the removal of the restrictions on Escrow Funds and shall release the Escrow Funds to Trade Partners and to the Premium Reserve Account as directed by Trade Partners. Escrow Agent shall rely on any document(s) which Escrow Agent reasonably believes satisfy(ies) the terms and conditions of the Escrow Agreement.

(Dkt. [*32] No. 141, Macatawa's Br. in Supp., Ex A.5, Escrow Agreement (rev. 10/15/1998) PP 3-5.) With one exception, the March 1, 1999, revision did not materially alter the pertinent parts of escrow agreement. The March 1, 1999, revision moved the last sentence of paragraph four to the end of paragraph five. (Macatawa's Br. in Supp. Ex. A.6, Escrow Agreement (rev. 03/01/1999) PP 4-5.) The March 1, 2000, revision made several changes, and provides in pertinent part:

> 2. Appointment of Escrow Agent: In order to fulfill the purpose and intent of this Agreement, the parties hereto appoint Grand Bank as Escrow Agent for the purpose of controlling the withdrawal of funds deposited herewith. Escrow Agent is hereby instructed to restrict withdrawal of Escrow Funds from the Escrow Account until presented with specified documents.
>
> 3. Restricted Account: The Escrow Account is a restricted-access account. It is hereby expressly stated that Trade Partners shall not have access to Escrow Funds for any reason until Escrow Agent receives the specified documents discussed in Section 5 of this Agreement and authorizes release of Escrow Funds from the Escrow Account to Trade Partners and/or to the Premium Escrow

> [*33] Account established by the Premium Escrow Agreement executed by Trade Partners and Escrow Agent on October 12, 1998 ("Premium Escrow Account").
>
> . . . .
>
> 5. Release of Funds: Escrow Agent shall not authorize the release of Escrow Funds to Trade Partners, the viator, or any other third party until presented with [the insurance documents]. Upon receipt and review of the documents listed above, Escrow Agent shall permit the removal of the restrictions on Escrow Funds and shall release Escrow Funds to Trade Partners and the Premium Escrow Account. Release of Escrow Funds shall be at the sole discretion of Escrow Agent. Escrow Agent shall rely on any document(s) which Escrow Agent reasonably believes satisfy(ies) the terms and conditions of the Escrow Agreement.

(Macatawa's Br. in Supp., Ex. A.7, Escrow Agreement (rev. 03/01/2000) PP 2-5.)

Macatawa contends that it was only obligated to follow the directions provided by TPI and that Plaintiffs have not offered any evidence that it failed to do so. Macatawa supports this contention with the following sentence from the fifth paragraph of the October 15, 1998, revision of the escrow agreement:

> Upon receipt, Escrow Agent shall permit the removal of [*34] the restrictions on Escrow Funds and shall release the Escrow Funds to Trade Partners and to the Premium Reserve Account as directed by Trade Partners.

(Escrow Agreement (rev. 10/15/1998) P 5.) The March 1, 1999, revision of the escrow agreement modifies this sentence by replacing the reference to the "Premium Reserve Account" with a reference to the "Premium Escrow Account." (Escrow Agreement (rev. 03/01/1999) P 5.) The March 1, 2000, revision to the escrow agreement deleted the last four words of the sentence: "as directed by Trade Partners." (Escrow Agreement (rev. 03/01/2000) P 5.)

Macatawa contends that based on the "as directed by Trade Partners" language, so long as Macatawa followed the directions of TPI, it did not violate the escrow agreements. As the language on which Macatawa relies is not present in the March 1, 2000, revision of the escrow agreement, there is a genuine issue of material fact as to what obligations the March 1, 2000, revision of the escrow agreement imposed on Macatawa with respect to the escrow of funds to pay insurance policy premiums. With respect to the October 15, 1998, and March 1, 1999, revisions of the escrow agreements, Macatawa's proposed interpretation [*35] would mean that it would have been permissible, if TPI so directed, for Macatawa to release all of the escrow funds directly to TPI and none to the Premium Reserve/Escrow Account. This interpretation disregards the "and" that follows the second "shall." The use of the conjunctive indicates that Macatawa was obligated by the "shall" to split the release of any escrow funds between TPI and the Premium Reserve/Escrow Account. Additionally, Macatawa's interpretation of "as directed by Trade Partners" is inconsistent with the last sentence of the third paragraph of the October 15, 1998, and March 1, 1999, revisions of the escrow agreements. The last sentence of the third paragraph indicates that "a portion" of the escrow funds are to be released to the "Premium Reserve Account" in the October 15, 1998, revision and the "Premium Escrow Account" in the March 1, 1999, revision. (Escrow Agreement (rev. 10/15/1998) P 3; Escrow Agreement (rev. 03/01/1999) P 3.) This language in the third paragraph arguably required Macatawa to apportion the released escrow funds between TPI and the "Premium Reserve Account"/"Premium Escrow Account." The reference in the October 15, 1998, revision to the "Premium [*36] Reserve Account" and in the March 1, 1999, revision to the "Premium Escrow Account" are both linked to the Premium Escrow Agreement executed by TPI and Macatawa on or after October 15, 1998. (Escrow Agreement (rev. 10/15/1998) P 3; Escrow Agreement (rev. 03/01/1999) P 3.) The reference to the Premium Escrow Agreement suggests that the reference to the "Premium Reserve Account" in the October 15, 1998, revision was intended to refer to the "Premium Escrow Account," so both revisions arguably refer to the same account.

The reference to the Premium Escrow Agreement in the third paragraph further suggests that the October 15, 1998, and March 1, 1999, revisions of the escrow agreements may reasonably be understood in a manner contrary to Macatawa's proposed interpretation. Although not an operative part of the Premium Escrow Agreement, two recitals in the Premium Escrow Agreement support an interpretation of the escrow agreements that is contrary to Macatawa's proposed interpretation. The pertinent recitals state that:

> D. The Escrow Agreement [the escrow agreements between individual investors

> and Macatawa] provides for distribution of a portion of the Purchase Funds to a Premium Escrow Account [*37] (the "Premium Escrow Account") in an amount sufficient to pay at least one hundred percent (100%) of the amount of premiums that will become due during the life expectancy of the viator (the "Premiums") as determined by the third party medical review (the "Escrow Funds").
>
> E. The Company [TPI] and the Escrow Agent [Macatawa] desire to establish the Premium Escrow Account pursuant to this Agreement and thereby provide for the payment of Premiums when they become due and payable.

(Farrell Aff., Ex. 33, Premium Escrow Agreement (rev. 10/15/1998) PP D-E.) In consideration of the entirety of the October 15, 1998, and March 1, 1999, revisions of the escrow agreements, those escrow agreements are ambiguous as to Macatawa's obligation to escrow funds to pay insurance policy premiums. This ambiguity extends to the March 1, 2000, revision of the escrow agreements, because that revision removes the language that most directly supports Macatawa's position. If a contract is ambiguous, then the interpretation of the contract is a question to be decided by the jury. *See Klapp,* 468 Mich. at 469. Therefore, it will be for a jury to decide what obligations Macatawa had to escrow funds for the payment of [*38] insurance policy premiums under the escrow agreements with revision dates of October 15, 1998, through March 1, 2000. [7]

> 7 The Court does not extend this conclusion beyond the March 1, 2000, revision, because Macatawa did not move as to any of the later revisions. Thus, the Court's opinion should not be read to indicate whether Macatawa's obligations under the post-March 1, 2000, revisions are jury questions.

As the Court has determined that the escrow agreements with revision dates of October 15, 1998, through March 1, 2000, are ambiguous as to Macatawa's obligations to escrow premiums, the Court cannot reach the further question of whether Macatawa breached its obligations. The declaration of Brian Downs and Plaintiffs' motion to disregard Mr. Downs's declaration both relate to the question of whether Macatawa breached those obligations. Therefore, Plaintiffs' motion to disregard the declaration of Brian Downs will be denied as moot.

**4. Plaintiffs Ronald and Rebecca Maier's breach of contract claim against Macatawa**

In the *Adamson v. Macatawa* case, Plaintiffs Ronald and Rebecca Maier move for partial summary judgment as to their breach of contract claim against Macatawa. Plaintiffs Maiers [*39] contend that Macatawa breached its obligation to escrow funds to pay insurance policy premiums. (File No. 1:07-CV-750, Dkt. No. 105, Maiers' Br. in Supp. 5-6.) Plaintiffs Maiers' motion is based on the version of the escrow agreement they signed, which was the October 15, 1998, revision of the escrow agreement. (Maiers' Mot. for Partial Summ. J., Ex. A, Maier Escrow Agreement (rev. 10/15/1998).) As the Court has determined that the October 15, 1998, escrow agreement is ambiguous as to Macatawa's obligations to escrow funds to pay insurance policy premiums, there is necessarily a genuine issue of material fact as to whether Macatawa breached that obligation with respect to Plaintiffs Maiers. Therefore, Plaintiffs Maiers' motion for partial summary judgment will be denied.

**5. Plaintiffs who invested in TPI's limited liability companies**

Macatawa moves for summary judgment as to the breach of contract claims of plaintiffs who invested in TPI's limited liability companies ("LLCs"). TPI sold interests in LLCs that would purchase and hold viatical settlements. Investors in TPI's LLCs were promised a specific monthly return, though the individual investor did not acquire a direct interest in [*40] any viatical settlement. The LLCs did have escrow agreements with Macatawa. Macatawa contends that its escrow agreements with the LLCs only required Macatawa to receive change of beneficiary forms before releasing funds and did not impose an obligation to escrow funds for the payment of premiums.

Plaintiffs acknowledge that the escrow agreements between the LLCs and Macatawa (the "LLC escrow agreements") did not require Macatawa to escrow funds for the payment of premiums. (Pls.' Resp. in Opp'n 31; *see also* Macatawa's Br. in Supp., Ex. D.1, LLC Escrow Agreement (rev. undated); Macatawa's Br. in Supp., Ex. D.2, LLC Escrow Agreement (rev. 06/15/1999); Macatawa's Br. in Supp., Ex. D.3, LLC Escrow Agreement (rev. 04/22/2000).) However, Plaintiffs contend that the LLC escrow agreements did require Macatawa to verify certain insurance documents and that the insurance policies underlying the LLCs had death benefits at least equal to the amount of escrow funds to be disbursed. Macatawa is entitled to summary judgment with respect to Plaintiffs' contentions regarding the insurance documents for the LLC escrow agreements for the same reason that Macatawa is entitled to summary

judgment with respect [*41] to insurance documents for the escrow agreements between Macatawa and individual investors, which is that the damages Plaintiffs seek to recover for do not arise naturally from any failure by Macatawa to properly verify the insurance documents. *See supra* Section III.B.2 - *Verification of insurance policy documents for plaintiffs who signed an escrow agreement with Macatawa.*

With respect to the requirement that the insurance policies underlying the LLCs had death benefits at least equal to the amount of escrow funds to be disbursed, Plaintiffs contend that there is a genuine issue of material fact as to whether Macatawa complied with these obligations based on a February 18, 2003, internal Macatawa memorandum from Robert T. Worthington. (Farrell Aff., Ex. 25, Memorandum from Robert T. Worthington to TPI Monthly Income LLC Files (Feb. 18, 2003).) Mr. Worthington's memorandum states that:

> A review of the documentation within the LLC files and the relating documentation maintained on the LLC Collateral spreadsheets for the TPI Monthly Income LLCs, resulted in identifying the following information:
>
> The LLC Collateral spreadsheets are updated regularly to reflect the current status of available [*42] collateral (i.e. all historical information is saved over), as contrasted with reflecting the available collateral at the time of a disbursement. Accordingly, it is possible for a spreadsheet to give the perception that disbursements occurred with insufficient collateral. In these cases, adequate collateral was indeed available at the time of disbursement, however the subsequent updating of the spreadsheet resulted in adjustment to the total available collateral balance.

(*Id.*) Plaintiffs direct the Court to the language that "it is possible for a spreadsheet to give the perception that disbursements occurred with insufficient collateral." (*Id.*) Mr. Worthington indicates that the spreadsheets could be read to indicate that the disbursements occurred with insufficient collateral; however, he explicitly indicates that such a reading of the spreadsheets would be an error and provides an explanation of why such a reading would be an error. Plaintiffs have not offered any other materials to support the contention that Macatawa disbursed funds without verifying that the insurance policies underlying the LLCs had death benefits at least equal to the amount of escrow funds to be disbursed. The [*43] only evidence offered indicates that "adequate collateral was indeed available at the time of disbursement," therefore there is no genuine issue of material fact that Macatawa verified that the insurance policies underlying the LLCs had death benefits at least equal to the amount of escrow funds to be disbursed prior to having disbursed funds. Macatawa is entitled to summary judgment as to the breach of contract claims of plaintiffs who invested in TPI's LLCs.

**C. Negligence claims**

Macatawa moves for summary judgment as to Plaintiffs' negligence claims on two bases. First, Macatawa moves for summary judgment on the negligence claims of plaintiffs who did not have escrow agreements with Macatawa because Macatawa did not owe such plaintiffs a duty. Second, Macatawa moves for summary judgment on the negligence claims of Plaintiffs who had an escrow agreement with Macatawa because the escrow agreements contain a limitation of liability and release for any claims of negligence.

**1. Plaintiffs who did not have escrow agreements with Macatawa**

Under Michigan law the elements of negligence are: duty, breach of that duty, causation, and damages. *Fultz v. Union-Commerce Assocs.*, 470 Mich. 460, 463, 683 N.W.2d 587 (2004). [*44] "The threshold question in a negligence action is whether the defendant owed a duty to the plaintiff. 'It is axiomatic that there can be no tort liability unless defendants owed a duty to plaintiff.'" *Id.* at 463 (*Beaty v. Hertzberg & Golden, P.C.*, 456 Mich. 247, 262, 571 N.W.2d 716 (1997)). "'Duty is essentially a question of whether the relationship between the actor and the injured person gives rise to any legal obligation on the actor's part for the benefit of the injured person.'" *Christy v. Glass*, 415 Mich. 684, 693, 329 N.W.2d 748 (1982) (quoting *Moning v. Alfono*, 400 Mich. 425, 438-39, 254 N.W.2d 759 (1977)). To determine if a party owes a duty to another several factors must be considered: "the relationship of the parties, the foreseeability of the harm, the burden that would be imposed on the defendant, and the nature of the risk presented." *In re Certified Question from Fourteenth Dist. Court of Appeals of Tex.*, 479 Mich. 498, 508, 740 N.W.2d 206 (2007). "Where there is no relationship between the parties, no duty can be imposed, but where there is a relationship, the other factors must be considered to determine whether a duty should be imposed." *Id.* at 508-09. Macatawa [*45] contends that it did not have a contractual relationship with Plaintiffs who did not sign escrow agreements, so it owed them no duty. Plaintiffs' response merely contends that their

arguments on the breach of contract claim addressed this issue. Plaintiffs fail to articulate a basis on which Macatawa owed a duty to Plaintiffs who did not sign escrow agreements. As Plaintiffs have not sustained their summary judgment burden, Macatawa is entitled to summary judgment on the negligence claims of Plaintiffs who did not have an escrow agreement with Macatawa.

**2. Effect of the limitation of liability and release in the escrow agreements**

Macatawa moves for summary judgment on the negligence claims of Plaintiffs who had an escrow agreement with Macatawa because the escrow agreements contain a limitation of liability and release for any claims of negligence. "[T]he validity of a contract of release turns on the intent of the parties." *Paterek v. 6600 Ltd.*, 186 Mich. App. 445, 448-49, 465 N.W.2d 342 (1990) (citing *Trongo v. Trongo*, 124 Mich. App. 432, 435, 335 N.W.2d 60 (1983)), *modified on other grounds* *Patterson v. Kleiman*, 447 Mich. 429, 433-34, 526 N.W.2d 879 (1994). A release is valid if it [*46] is fairly and knowingly made. *Denton v. Utley*, 350 Mich. 332, 342, 86 N.W.2d 537 (1957). "A release is not fairly made and is invalid if (1) the releasor was dazed, in shock, or under the influence of drugs, (2) the nature of the instrument was misrepresented, or (3) there was other fraudulent or overreaching conduct." *Paterek*, 186 Mich. App. at 449 (citing *Theisen v. Kroger Co.*, 107 Mich. App. 580, 582-83, 309 N.W.2d 676 (1981)).

The escrow agreements provide:

> 11. Obligations and Duties of Escrow Agent. The obligations and duties of Escrow Agent under this Escrow Agreement are limited as follows:
>
> . . . .
>
> 11.2 Limited Liability. Escrow agent may act upon any written notice, request, waiver, consent, certificate, receipt, authorization, power of attorney, or other instrument or document which Escrow Agent in good faith believes to be genuine and to be what it purports to be. Anything in this Agreement to the contrary notwithstanding, Escrow Agent shall not be liable to any party to this Agreement for anything which it may do or refrain from doing in connection with this Agreement, unless Escrow Agent is guilty of gross negligence of [*sic* [8]] willful misconduct.
>
> . . . .
>
> 12. Release of Escrow [*47] Agent. The parties hereto release the Escrow Agent and its employees from any damages, losses or expenses which either party may sustain or incur, unless the same is a direct result of the gross negligence or intentional misconduct of Escrow Agent. Escrow Agent shall be protected in any action taken or omitted in good faith with respect to its duties and responsibilities under the provisions of this Escrow Agreement.

(Escrow Agreement (rev. undated) PP 11, 11.2, 12.) [9] The LLC escrow agreements contain materially similar limitations of liability and releases. (LLC Escrow Agreement (rev. undated) PP 5, 5.b, 6; LLC Escrow Agreement (rev. 06/15/1999) PP 5, 5.b, 6; LLC Escrow Agreement (rev. 04/22/2000) PP 6, 6.b. 6. [10])

8 This error was corrected (replacing "of" with "or") in the January 1, 1998, and later revisions of the escrow agreement. (*E.g.,* Macatawa's Br. in Supp., Ex. A.3, Escrow Agreements (rev. 01/01/1998) P 11.2.)

9 This same language appears without material change in the later revisions of the escrow agreement. (Macatawa's Br. in Supp., Ex. A.2, Escrow Agreement (rev. 03/21/1997) PP 11, 11.2, 12; Escrow Agreement (rev. 01/01/1998) PP 11, 11.2, 12; Macatawa's Br. in Supp., Ex. [*48] A.4, Escrow Agreement (rev. 05/27/1998) PP 11, 11.2, 12; Escrow Agreement (rev. 10/15/1998) PP 11, 11.2, 12; Escrow Agreement (rev. 03/01/1999) PP 11, 11.2, 12; Escrow Agreement (rev. 03/01/2000) PP 10, 10.b, 11; Macatawa's Br. in Supp., Ex. A.8, Escrow

Agreement (rev. 06/20/2000) PP 10, 10.b, 11; Macatawa's Br. in Supp., Ex. A.9, Escrow Agreement (rev. 09/15/2000) PP 10, 10.b, 11; Macatawa's Br. in Supp., Ex. A.10, Escrow Agreement (rev. 09/20/2001) PP 10, 10.b, 11; Macatawa's Br. in Supp., Ex. A.11, Escrow Agreement (rev. 03/08/2002) PP 10, 10.b, 11.)

10 The April 22, 2000, revision of the LLC escrow agreement contains two paragraphs numbered "6."

Macatawa contends that it is entitled to summary judgment on the negligence claims based on this language in the escrow agreements and LLC escrow agreements. Plaintiffs contend that the escrow agreements were obtained by fraud and that therefore the releases in the escrow agreements are invalid. However, Plaintiffs fail to offer any evidence to support the allegation that the limitations of liability and releases in the escrow agreements and LLC escrow agreements were obtained by fraud. As Plaintiffs have failed to offer any evidence in support [*49] of their contention that the limitations of liability and releases in the escrow agreements and escrow agreements were obtained by fraud, as a matter of summary judgment, the limitations of liability and releases are valid. *See* Brooks v. Holmes, 163 Mich. App. 143, 144-46, 413 N.W.2d 688 (1987) (*per curiam*) (affirming a trial court's decision that a release was valid in a case in which the plaintiffs alleged fraud, misrepresentation, and negligence as to the underlying transaction, but not as to the release).

Plaintiffs also contend that even if the limitations of liability and releases are valid, Macatawa's negligence extended beyond the escrow agreements and LLC escrow agreements, thus Macatawa's negligence is outside the scope of the limitations of liability and releases in the escrow agreements and LLC escrow agreements. The principal other document upon which Plaintiffs rely is the Premium Escrow Agreement. The Premium Escrow Agreement contains a limitation of liability and release that is materially similar to the limitations of liability and releases in the escrow agreements and LLC escrow agreements. (Premium Escrow Agreement (rev. 10/15/1998) PP 5, 5.b, 6.) Hence, any negligence [*50] claims based on the Premium Escrow Agreement are barred to the same extent as negligence claims are barred by the escrow agreements and LLC escrow agreements. Plaintiffs also argue that Macatawa was negligent in its actions wholly apart from its role as escrow agent and so those actions are outside of the scope of any of the limitations of liability or releases. This contention by Plaintiffs fails because in response to another portion of Macatawa's motion, Plaintiffs were unable to articulate any duties that Macatawa owed to Plaintiffs that could support a negligence claim outside of the duties arising from the escrow agreements, LLC escrow agreements, and Premium Escrow Agreement. (*See* Pls.' Resp. in Opp'n 34-35 (referring to Plaintiffs' arguments on the breach of contract claim in response to Macatawa's argument that Plaintiffs' negligence claims failed because they allege no duty beyond the contractual duties).) Therefore, Macatawa is entitled to summary judgment as to Plaintiffs' negligence claims being barred by the limitations of liability and releases in the escrow agreements, LLC escrow agreements, and Premium Escrow Agreement.

**D. Fraudulent inducement claims**

Macatawa moves [*51] for summary judgment as to the fraudulent inducement claims of Plaintiffs who had no pre-purchase contact with Macatawa. Plaintiffs' fraudulent inducement claims are based on a fraud by omission theory. Under Michigan law, the elements of fraud by omission are:

> "(1) a material representation which is false; (2) known by defendant to be false, or made recklessly without knowledge of its truth or falsity; (3) that defendant intended plaintiff to rely upon the representation; (4) that, in fact, plaintiff acted in reliance upon it; and (5) thereby suffered injury. . . . The false material representation needed to establish fraud may be satisfied by the failure to divulge a fact or facts the defendant has a duty to disclose. Such an action is one of fraudulent concealment."

*McMullen v. Joldersma*, 174 Mich. App. 207, 213, 435 N.W.2d 428 (1988) (omission in *McMullen*) (quoting *Jaffa v. Shacket*, 114 Mich. App. 626, 640-41, 319 N.W.2d 604 (1982)). Plaintiffs' fraudulent inducement claims are addressed to the time period prior to any given plaintiff deciding to invest, so Macatawa could only have had a duty to disclose based on either (1) pre-purchase contact between a plaintiff and Macatawa, or [*52] (2) a pre-purchase contract imposing a duty to disclose on Macatawa. Because Macatawa does not move as to Plaintiffs who had pre-purchase contact with it, the Court need not consider the first category. With respect to the second category, Plaintiffs claim Macatawa made representations to Plaintiffs that Macatawa would protect their investments and Macatawa failed to do so. However, assuming *arguendo* that Macatawa had a pre-purchase duty to disclose to Plaintiffs who did not have contact with Macatawa, "a claim of fraud in the inducement, by definition, redresses misrepresentations

that induce the buyer to enter into a contract but that do not in themselves constitute contract or warranty terms subsequently breached by the seller." *Huron Tool and Eng'g Co. v. Precision Consulting Servs., Inc.*, 209 Mich. App. 365, 375, 532 N.W.2d 541 (1995). Plaintiffs implicitly acknowledge that their fraudulent inducement claims are based on the terms of the escrow agreements by stating: "By proferring the Escrow Agreements to investors, the Bank made a promise to escrow funds, without disclosing its intent not to perform." (Pls.' Resp. in Opp'n 36.) Therefore, Macatawa is entitled to summary judgment [*53] as to the fraudulent inducement claims of Plaintiffs who had no pre-purchase contact with Macatawa because the fraudulent inducement claim of such Plaintiffs is based on the representations in the escrow agreements.

**E. Application of the economic loss doctrine to Plaintiffs' negligence, gross negligence, and breach of fiduciary duty claims**

Macatawa moves for summary judgment as to Plaintiffs' negligence, gross negligence, and breach of fiduciary duty claims based on Michigan's economic loss doctrine. The economic loss doctrine "has firm roots in Michigan jurisprudence." *Huron Tool and Eng'g Co.*, 209 Mich. App. at 369 (collecting cases). Under Michigan law, the economic loss doctrine bars an action in tort based on the same duty as would give rise to an action for breach of contract. *Rinaldo's Const. Corp. v. Mich. Bell Tel. Co.*, 454 Mich. 65, 83, 559 N.W.2d 647 (1997). An action in tort must be based on "'some breach of duty distinct from breach of contract.'" *Id.* ((quoting *Hart v. Ludwig*, 347 Mich. 559, 563, 79 N.W.2d 895 (1956)). "[T]he threshold inquiry is whether the plaintiff alleges violation of a legal duty separate and distinct from the contractual obligation.'" *Id.* at 84. The [*54] application of the economic loss doctrine under Michigan law has not been limited to contracts for the sale of goods. *Rinaldo's Const. Corp.* 454 Mich. at 84-85 (applying the economic loss doctrine to a telephone service contract); *TIBCO Software, Inc. v. Gordon Food Serv., Inc.*, No. 1:03-CV-25, 2003 U.S. Dist. LEXIS 12020, 2003 WL 21683850, at *3 (W.D. Mich. July 3, 2003) ("Michigan courts have not limited the principles of *Neibarger [v. Universal Cooperatives, Inc.*, 439 Mich. 512, 486 N.W.2d 612 (1992),] to contracts for the sale of goods." (citations omitted)).

Plaintiffs contend that Macatawa had duties as a fiduciary apart from its contractual duties based on Macatawa's role as trustee of the TPI Grand Trust. The TPI Grand Trust was a Delaware business trust formed on September 3, 1998. (Farrell Aff., Ex. 7, TPI Grand Trust - Trust Agreement.) Thus, Plaintiffs offer no basis for Macatawa's duties, apart from its contractual duties, prior to September 3, 1998. It is undisputed that Macatawa was the Property Trustee of the TPI Grand Trust. (TPI Grand Trust - Trust Agreement 1.) In denying class certification in *Jenkins v. Macatawa* the Court addressed Macatawa's duties and liabilities as Property Trustee of the [*55] TPI Grand Trust:

> The trust agreement gave the Property Trustee the power to: (i) establish bank accounts for the trust, (ii) receive death benefits from the policies and (iii) to distribute the proceeds from the policies in accordance with the trust agreement. ([TPI Grand Trust - Trust Agreement] P 5.2.) The trust agreement also expressly limits the Property Trustee's liability to violations of the aforementioned duties. (*Id.* at P 5.3(b).) Delaware law permits a business trust agreement to impose such limitations on liability. Del. Code Ann. tit. 12 § 3806(e) (2006) ("A governing instrument may provide for the limitation or elimination of any and all liabilities for breach of contract and breach of duties (including fiduciary duties) of a trustee . . . to a . . . beneficial owner or to another person that is a party to or is otherwise bound by a governing instrument . . . .").

(File No. 1:03-CV-321, Dkt. No. 679, 11/09/2006 Am. Op. 23-24 (omissions in the Court's prior opinion).) In pertinent part paragraph 5.3(a) of the TPI Grand Trust - Trust Agreement provides:

> [T]he Property Trustee shall have no duty or liability with respect to the administration of the Trust, investment of the [*56] Trust's property or distributions to the Unit-holders, and no implied obligations on the part of the Property Trustee shall be inferred from this Trust Agreement.

(TPI Grand Trust - Trust Agreement P 5.3(b).) Thus, the TPI Grand Trust - Trust Agreement, cannot have imposed any duties on Macatawa beyond those explicitly delineated in the trust agreement. As the TPI Grand Trust did not impose any duties on Macatawa beyond Macatawa's contractual duties, Plaintiffs have failed to identify "a legal duty separate and distinct from the contractual obligation." *Rinaldo's Const. Corp.*, 454 Mich. at 84.

Plaintiffs specifically challenge the application of the economic loss doctrine to their breach of fiduciary

duty claims. In support of this Plaintiffs direct the Court to following statement from *Evans v. Singer,* 518 F. Supp. 2d 1134 (D. Ariz. 2007): "outside the product liability context, the [economic loss] doctrine has produced difficulty and confusion." *Evans,* 518 F. Supp. 2d at 1140 (quoting *Giles v. Gen. Motors Acceptance Corp.,* 494 F.3d 865, 874 (9th Cir. 2007)). The *Evans* court was applying Arizona law, *id* at 1139-40, and in this MDL action the non-securities law claims are governed by [*57] Michigan law. (Op. re Choice-of-Law 24; Order re Choice-of-Law 1.) While other jurisdictions may not apply the economic loss doctrine to breach of fiduciary duty claims, Michigan does. *Scarff Bros., Inc. v. Bischer Farms, Inc.,* 546 F. Supp. 2d 473, 487-88 (E.D. Mich. 2008) (finding plaintiff's claims of negligence, innocent or fraudulent misrepresentation, silent fraud, breach of fiduciary duty, breach of bailment, and common law and statutory conversion barred by Michigan's economic loss doctrine); *cf. Huron Tool and Engineering Co.,* 209 Mich. App. at 370-71 (listing possible exceptions to the application of the economic loss doctrine in Michigan, but not identifying breach of fiduciary duty as a possible exception). Therefore, as a matter of law, Plaintiffs' negligence, gross negligence, and breach of fiduciary duty claims are barred by the economic loss doctrine. [11]

> 11 Apart from moving for summary judgment on the negligence and breach of fiduciary duty claims based on the economic loss doctrine, Macatawa also moved for summary judgment based on the duties underlying the negligence and breach of fiduciary duty claims being equivalent to Macatawa's contractual duties. As Macatawa only [*58] provided limited analysis in support of this argument (Macatawa's Br. in Supp. 10-11), the Court declines to separately analyze what could be described as an explanation of the purpose of the economic loss doctrine.

**F. Michigan Uniform Securities Act Claims**

Macatawa moves for summary judgment with respect to Plaintiffs' claims under the Michigan Uniform Securities Act ("MUSA"). However, only the *Jenkins* Plaintiffs assert a claim under the MUSA. (*Jenkins* Second Am. Consol. Class Action Compl. PP 70-71.) The other Plaintiffs assert their state securities law claims under the laws of Oklahoma and Texas. (*Adamson* Pls.' Sixth Am. Compl. PP 56-58 (alleging a violation of Texas securities law); *Bailey* Pls.' Fourth Am. Compl. PP 56-58 (alleging a violation of Texas securities law); *Elkins* Pls.' Compl. P 37 (alleging a violation of Oklahoma securities law); *Myers* Pls.' Third Am. Compl. PP 56-59 (alleging a violation of Texas securities law).) Thus, this portion of Macatawa's motion only applies to the *Jenkins* Plaintiffs. Macatawa moves for summary judgment on the MUSA claim based on the contention that there is no genuine issue of material fact as to Macatawa not having been either the seller [*59] or the person who controlled the seller of unregistered securities.

The Court previously determined that viatical settlements are securities under the MUSA. (Dkt. No. 211, 04/15/2008 Op. 13-16.) Section 301(1) of the MUSA requires that all securities offered or sold in Michigan be registered with the State of Michigan. [12] M.C.L.A. § 451.701(1) (West 2008). [13] TPI's viatical settlement products were not registered with the State of Michigan. The *Jenkins* Plaintiffs allege that under section 410 of the MUSA Macatawa "was a seller, or a person who directly or indirectly controlled a seller, of unregistered securities . . . ." (*Jenkins* Second Am. Consol. Class Action Compl. P 70.)

> 12 There are exceptions to the section 301 registration requirement, M.C.L. § 451.701(2-3); however, no party has suggested that any of those exceptions were applicable to TPI's viatical settlements.
>
> 13 "In 2000 the Michigan Legislature revised the MUSA. 2000 Mich. Pub. Acts 494. The revisions were effective January 11, 2001." (11/09/2006 Am. Op. 26 n.5.) The revisions changed M.C.L. §§ 451.701, .801, and .810; however, the revisions did not alter the elements for the MUSA claims asserted by the *Jenkins* Plaintiffs. [*60] *Compare* M.C.L.A. § 451.701 (West 2000) *with* M.C.L.A. § 451.701 (West 2008); *compare* M.C.L.A. § 451.801 (West 2000) *with* M.C.L.A. § 451.801 (West 2008); *compare* M.C.L.A. § 451.810 (West 2000) *with* M.C.L.A. § 451.810 (West 2008). For simplicity, in the remainder of the opinion the Court only cites to the post-revision version of the statute, *i.e.,* M.C.L.A. § 451.701 (West 2008).

Section 410 of the MUSA provides:

> (a) Any person who does either of the following is liable to the person buying the security from him or her . . .:
>
> (1) Offers or sells a security in violation of [the MUSA].
>
> . . . .

> (b) Every person who directly or indirectly controls a seller liable under subsection (a), every partner, officer, or director of the seller, every person occupying a similar status or performing similar functions, every employee of the seller who materially aids in the sale, and every broker-dealer or agent who materially aids in the sale are also liable jointly and severally with and to the same extent as the seller, unless the person sustains the burden of proof that he or she did not know, and in exercise of reasonable care could not have known, of the existence of the facts by reason of which the [*61] liability is alleged to exist. There is contribution as in cases of contract among the several persons so liable.

M.C.L.A. § 451.810(a-b) (West 2008). Section 410(a) of the MUSA does not impose aider and abetter liability. *Mercer v. Jaffe, Snider, Raitt and Heuer, P.C.*, 713 F. Supp. 1019, 1028 (W.D. Mich. 1989).

**1. Seller under the MUSA**

The MUSA does not define "seller." Federal cases interpreting the federal securities laws have defined who constitutes a "seller," and Michigan courts refer to federal securities law in interpreting the MUSA. *Michelson v. Voison*, 254 Mich. App. 691, 695, 658 N.W.2d 188(2003); *Michigan v. Breckenridge*, 81 Mich. App. 6, 16-17, 263 N.W.2d 922 (1978). The federal securities statutes do not define "seller;" however, the United States Supreme Court has defined "seller" under federal securities law. In *Pinter v. Dahl*, 486 U.S. 622, 108 S. Ct. 2063, 100 L. Ed. 2d 658 (1988), the Supreme Court defined "seller" under section 12(1) of the Securities Act of 1933 as a

> person who successfully solicits the purchase, motivated at least in part by a desire to serve his own financial interests or those of the securities owner. If he had such a motivation, it is fair to say that the buyer "purchased" the [*62] security from him and to align him with the owner in a rescission action.

486 U.S. at 647. In applying this test to a claim under section 12(2) of the Securities Act of 1933, the Sixth Circuit phrased the test as "whether the defendant either passed title or offered to do so, or solicited an offer." *Smith v. Am. Nat'l Bank and Trust Co.*, 982 F.2d 936, 942 (6th Cir. 1992). The *Jenkins* Plaintiffs contend that there is a genuine issue of material fact as to whether Macatawa was either a direct seller or a solicitor seller of TPI's viatical settlements.

The *Jenkins* Plaintiffs contend that Macatawa is a direct seller because Macatawa participated in the transfer of title to the viatical settlement to individual investors. Under the MUSA, "security" includes "investment contracts," M.C.L.A. § 451.801(z) (West 2008), [14] and

> an investment contract for purposes of the Securities Act means a contract, transaction or scheme whereby a person invests his money in a common enterprise and is led to expect profits solely from the efforts of the promoter or a third party, it being immaterial whether the shares in the enterprise are evidenced by formal certificates or by nominal interests in the physical [*63] assets employed in the enterprise.

*S.E.C. v. W.J. Howey Co.*, 328 U.S. 293, 298-99, 66 S. Ct. 1100, 90 L. Ed. 1244 (1946). [15] The *Jenkins* Plaintiffs contend that under this definition, each component of the *Jenkins* Plaintiffs' transaction must be considered and that when those components are considered there is a genuine issue of material fact as to whether Macatawa was a direct seller of securities. The purchase of a TPI viatical settlement typically required an investor to enter into an agency/policy funding agreement with TPI and an escrow agreement with Macatawa. Under this structure, the profits that an investor could expect would, at a minimum, be based on how long the viator lived, TPI's performance under the agency/policy funding agreement, and Macatawa's performance under the escrow agreement.

> 14 Prior to the 2000 amendments to the MUSA, "security" was defined by M.C.L.A. § 451.801(z) (West 2000).
>
> 15 In *Department of Commerce v. DeBeers Diamond Investment, Ltd.*, 89 Mich. App. 406, 411, 280 N.W.2d 547 (1979), Michigan adopted the *Howey* test for what constitutes an "investment contract." *Rzepka v. Michael*, 171 Mich. App. 748, 759, 431 N.W.2d 441 (1988); *Michigan v. Cooper*, 166 Mich. App. 638, 646-47, 421 N.W.2d 177 (1987).

Macatawa [*64] contends that this application of the definition of "investment contract" does not satisfy the requirements of either *Pinter* or *Howey,* and directs the Court to *Schlifke v. Seafirst Corp.,* 866 F.2d 935 (7th Cir. 1989). In *Schlifke,*

> ENI Corporation ("ENI") sold limited partnership interests in ENI Exploration Program 1981-III ("ENI 1981-III"), a limited partnership organized to engage in oil and gas exploration and managed by ENI Exploration Company . . . . ENI obtained financing for the 1981-III program from Seattle-First National Bank . . . . Under the terms of the executed Loan Agreement, borrowings by ENI 1981-III were to be secured by letters of credit from investors, equivalent to 116% of each investor's financial commitment to the program. The Bank established certain criteria for banks issuing letters of credit to ensure that they were financially secure. By arranging these letters of credit to secure the Bank's loan to the exploration program and by assuming a proportionate share of the indebtedness pursuant to an Assumption Agreement, investors were afforded a tax deduction without any initial cash outlay.

*Id.* at 938. Two investors filed suit after ENI 1981-III defaulted on its [*65] loan and Seattle-First National Bank demanded payment on the letters of credit. *Id.* The plaintiffs in *Schlifke* argued that the entire transaction between the plaintiffs, Seattle-First National Bank, and ENI constituted an "investment contract." *Id.* at 941. The plaintiffs' theory was that the bank had an expectation of profit in the loan, which was guaranteed by the plaintiffs' letters of credit, from both the fixed rate of interest on the loan and from an increased likelihood that the other debt owed by ENI and its associates would be repaid. The Seventh Circuit explained that the bank's involvement had been limited to a "mere 'commercial' loan transaction" because the fixed interest payments the bank would receive from the loans were not "profits" in the context of securities law. *Id.* at 941-42. As to the increased likelihood of repayment on other debt, the Seventh Circuit indicated that this was not properly understood as profits, because this money was already owed to the bank. *Id.* at 942. Although the court in *Schlifke* did reject the application of *Howey* put forward by the plaintiffs in the case before it as "contrived," the structure of the purchase of TPI's viatical settlements [*66] is distinguishable from the plaintiffs' theory in *Schlifke*. First, Macatawa was not involved with TPI as a commercial lender. Second, the bank in *Schlifke* had no contact with sales personnel and did not otherwise promote the investment, *id.* at 941, while genuine issues of material fact remain as to Macatawa's involvement in the marketing and promotion of TPI's viatical settlements. Third, the theory espoused by the plaintiffs in *Schlifke* classified them as co-investors with the bank in the loan. In contrast the *Jenkins* Plaintiffs make no contention that Macatawa was a co-investor in the viatical settlements. The *Jenkins* Plaintiffs' theory is more akin to them having invested in the joint efforts of TPI, Macatawa, and the viator. Under application of the definition of an "investment contract" in *Howey,* there are genuine issues of material fact as to whether Macatawa, as a direct seller, "passed title, or other interest in the security, to the buyer for value." *Pinter,* 486 U.S. at 642 (citing 3 L. Loss, *Securities Regulation* 1016 (2d ed. 1961)).

Macatawa also argues that it is entitled to summary judgment because it did not have "direct contact" with the *Jenkins* Plaintiffs. [16] A solicitor [*67] seller, who is not the actual owner is not barred from being a seller, but to be a seller, such a person must have "urge[d] a prospective purchaser to buy." *Am. Nat'l Bank and Trust Co.,* 982 F.2d at 941. Macatawa contends that in a prior case the Court concluded under *Pinter* and *American National Bank and Trust Co.* that there must be direct contact between the seller and the purchaser. *Montcalm County Bd. of Comm'rs v. McDonald & Co. Sec., Inc.,* 833 F. Supp. 1225, 1232 (W.D. Mich. 1993) ("*Pinter* apparently requires someone to be an issuer or a paid participant who actually contacted a buyer and urged the buyer to purchase before such participant would meet the first prong of the solicitation test.'" (quoting Joseph E. Reece, *Would Someone Please Tell Me the Definition of the Term 'Seller': The Confusion Surrounding Section 12(2) of the Securities Act of 1933,* 14 Del. J. Corp. L. 35, 105 (1989))). In *Montcalm County Board of Commissioners* the Court's decision did not rest on whether there had been direct person-to-person contact, because in that case there had indisputably been direct person-to-person contact. *Id.* at 1232-33 (discussing the telephone calls between the plaintiff and [*68] the defendant). Rather, in *Montcalm County Board of Commissioners* the Court concluded that the defendant had not "urged" the plaintiff to invest because the contacts between the plaintiff and the defendant "were always initiated by plaintiff, except for the occasional reminder of a maturing investment." *Id.* at 1233. Thus, *Montcalm County Board of Commissioners* cannot be read to have held that direct person-to-person contact is required.

16 Macatawa contends that the Court previously ruled on this question in its amended opinion denying class certification. Macatawa references the following language from the the Court's November 9, 2006, amended opinion:

> Resolving whether Grand Bank was a "seller" will at a minimum involve questions about whether an investor met or spoke with a Grand Bank representative and whether the investor received any materials produced by Grand Bank. . . . Individual questions predominate as to the sale of unregistered securities claim because the representations made to each investor will determine whether Grand Bank was a "seller" with respect to that investor.

(11/09/2006 Am. Op. 26-27.) This language from the Court's prior opinion is consistent with the Court's [*69] analysis of Macatawa's motion for partial summary judgment. The Court's opinion denying class certification acknowledged the significance of certain facts to the MUSA claims, but the opinion does not indicate that a MUSA claim necessarily fails if those facts are not established. Moreover, nothing in the Court's analysis of Macatawa's motion for partial summary judgment suggests that Macatawa having met with an investor, Macatawa having spoken with an investor, or an investor having received materials produced by Macatawa is irrelevant to whether Macatawa was a seller under section 410(a) of the MUSA.

Lastly, Macatawa directs the Court to several cases with statements to the effect that a plaintiff "must demonstrate direct and active participation in the solicitation of the immediate sale," *In re Craftmatic Securities Litigation,* 890 F.2d 628, 636 (3d Cir. 1989) (citations omitted), which is not wholly distinct from the Sixth Circuit's phrasing in *American National Bank and Trust Co.* However, the Court need not parse any such distinctions because there are genuine issues of material fact as to whether Macatawa directly and actively participated in the solicitation of the sales of TPI's [*70] viatical settlements and as to whether Macatawa urged prospective purchasers to buy TPI's viatical settlements. (*E.g.,* Farrell Aff., Ex. 30, Tr. of Champions of Indus. Video; Farrell Aff., Ex. 49, Letter from Richard Deardorff, Vice President and Trust Officer, Grand Bank, to Harry Robinson (June 26, 1998) ("Per our conversation earlier this week, I have enclosed some literature regarding Grand Bank for use in your presentations to your clients.").) The existence of genuine issues of material fact as to Macatawa having been a solicitor seller is typified by a letter from Richard Deardorff, who was a vice president and trust officer at Macatawa, which states in pertinent part:

> . . . Grand Bank now serves in the capacity of Trustee for the TPI/Grand Trust, issues monthly interest checks and pays premium payments for policies owned by Trade Partners. For these services, Grand Bank is paid a fee by Trade Partners, Inc., which is wholly paid by the corporation and not by any assets of any of the accounts.
>
> In the three years we have dealt with Trade Partners, Inc., our dealings with them have been very satisfactory. As of this date, we believe the principals of Trade Partners to be honest [*71] and trustworthy people and certainly of high business and ethical standards. Our relationship with them would not exist if this were not true. Nor would it have been as successful. Our estimates show that over $ 326 million have flowed through the Trade Partners accounts at Grand Bank over the last three years.

(Farrell Aff., Ex. 52, Letter from Richard Deardorff, Vice President and Trust Officer, Grand Bank, to Sean Quinn, Capital Group (Barbados), Inc., (Dec. 2, 1999).) [17] At minimum these materials indicate that there is a genuine issue of material fact as to Macatawa's role having been greater than the bank in *American National Bank and Trust Co.,* which had only advised a borrower at the bank that the bank would terminate its relationship with the borrower unless the borrower found a third-party (the plaintiff) to sign a note to cover certain indebtedness of the borrower to the bank. 982 F.2d at 939. On consideration of the materials before the Court, there are genuine issues of material fact as to whether Macatawa, as a solicitor seller, urged prospective purchasers to buy.

17 The Court notes that it is not readily apparent whether exhibits 49 and 52 to the Farrell Affidavit were [*72] part of transactions involving the *Jenkins* Plaintiffs, who are the only plaintiffs who assert claims under the MUSA. If the exhibits were not part of transactions

> involving the *Jenkins* Plaintiffs, then the exhibits may be distinguishable from the materials involved in the transactions made by the *Jenkins* Plaintiffs. Nevertheless, Macatawa made no such contention in its briefing or at oral argument, thus the Court must conclude that exhibits 49 and 52 were part of transactions involving the *Jenkins* Plaintiffs or that the exhibits are representative of documents that were part of transactions involving the *Jenkins* Plaintiffs.

As the Court has concluded that there are genuine issues of material fact as to Macatawa being either a direct seller or a solicitor seller, Macatawa is not entitled to summary judgment that it was not a seller under section 410(a) of the MUSA

**2. A person who controls a seller under the MUSA**

Macatawa moves for summary judgment that it was not a person who controlled a seller under section 410(b) of the MUSA. Plaintiffs did not address this issue in their response to Macatawa's motion. Therefore, as Plaintiffs have not met their summary judgment burden on this issue, [*73] Macatawa is entitled to summary judgment that it was not a person who controlled a seller under section 410(b) of the MUSA.

**IV. Conclusion**

For the foregoing reasons, Plaintiffs' and Macatawa's motions are granted and denied as follows. Plaintiffs Ronald and Rebecca Maier's motion for partial summary judgment on their breach of contract claim is denied. *See supra* Section III.B.4. Plaintiffs' motion to disregard the declaration of Brian Downs is denied as moot. *See supra* Section III.B.3.b. Macatawa's motion for partial summary judgment is granted in part and denied in part. Macatawa's motion for partial summary judgment is granted as to the negligence, gross negligence, and breach of fiduciary duty claims of all plaintiffs. *See supra* Sections III.C, III.E. Macatawa's motion for partial summary judgment is granted as to the *Jenkins* Plaintiffs' MUSA claims that are premised on Macatawa having been a person who controlled a seller of unregistered securities. *See supra* Section III.F.2. Macatawa's motion for partial summary judgment is granted as to the breach of contract and fraudulent inducement claims of certain categories of plaintiffs as set forth in this opinion. *See supra* Section III.A, [*74] III.B.1, III.B.3.a, III.B.5, III.D. Macatawa's motion for partial summary judgment is denied as to the *Jenkins* Plaintiffs' MUSA claims that are premised on Macatawa having been a seller of unregistered securities. *See supra* Section III.F.1. Macatawa's motion for partial summary judgment is also denied on the breach of contract claims of all plaintiffs with an escrow agreement with a revision date of October 15, 1998, through March 1, 2000. *See supra* Sections III.B.3.b. An order will be entered consistent with this opinion.

Dated: August 15, 2008

/s/ Robert Holmes Bell

ROBERT HOLMES BELL

UNITED STATES DISTRICT JUDGE

**ORDER REGARDING MACATAWA'S AND THE MAIERS' MOTIONS FOR PARTIAL SUMMARY JUDGMENT**

In accordance with the opinion entered this date,

**IT IS HEREBY ORDERED** that Macatawa Bank and Macatawa Bank Corporation's motion for partial dismissal and/or summary judgment (Dkt. No. 140) is **GRANTED IN PART AND DENIED IN PART,** as set forth in the accompanying opinion.

**IT IS FURTHER ORDERED** that Plaintiffs Ronald and Rebecca Maier's motion for partial summary judgment on their breach of contract claim (File No. 1:07-MD-1846, Dkt. No. 145, File No. 1:07-CV-750, Dkt. No. 104) is **DENIED.**

**IT IS** [*75] **FURTHER ORDERED** that Plaintiffs' motion for the declaration of Brian Downs to be disregarded (Dkt. No. 227) is **DENIED AS MOOT.**

Dated: August 15, 2008

/s/ Robert Holmes Bell

ROBERT HOLMES BELL

UNITED STATES DISTRICT JUDGE

LEXSEE

**BRUCE J. ISHMAN, Individually and on behalf of all others similarly situated, Plaintiff-Appellant, vs. FEATHERLITE, INC., a/d/b/a FEATHERLITE MANUFACTURING, INC., Defendant-Appellee.**

**No. 8-927 / 08-0372**

**COURT OF APPEALS OF IOWA**

**2009 Iowa App. LEXIS 172**

**March 11, 2009, Filed**

**NOTICE:**

NO DECISION HAS BEEN MADE ON PUBLICATION OF THIS OPINION. THE OPINION IS SUBJECT TO MODIFICATION OR CORRECTION BY THE COURT AND IS NOT FINAL UNTIL THE TIME FOR REHEARING OR FURTHER REVIEW HAS PASSED. AN UNPUBLISHED OPINION MAY BE CITED IN A BRIEF; HOWEVER, UNPUBLISHED OPINIONS SHALL NOT CONSTITUTE CONTROLLING LEGAL AUTHORITY.

**SUBSEQUENT HISTORY:** Reported at Ishman v. Featherlite, Inc., 766 N.W.2d 648, 2009 Iowa App. LEXIS 828 (Iowa Ct. App., 2009)

**PRIOR HISTORY:** [*1]

Appeal from the Iowa District Court for Howard County, Monica Ackley, Judge. An employee appeals a district court ruling granting his employer's motion for summary judgment on his class action claims for unpaid wages, loss of vacation benefits, and loss of personal/sick days.

Ishman v. Featherlite, Inc., 728 N.W.2d 60, 2006 Iowa App. LEXIS 2061 (Iowa Ct. App., 2006)

**DISPOSITION:** AFFIRMED.

**COUNSEL:** Mark B. Anderson, Cresco, for appellant.

Brent Green and Kirk Bainbridge of Duncan, Green, Brown & Langeness, Des Moines, for appellee.

**JUDGES:** Heard by Vogel, P.J., and Vaitheswaran and Eisenhauer, JJ.

**OPINION BY:** VAITHESWARAN

**OPINION**

**VAITHESWARAN, J.**

An employee appeals a district court ruling granting his employer's motion for summary judgment on his class action claims for unpaid wages, loss of vacation benefits, and loss of personal/sick days.

***I. Background Facts and Proceedings***

The undisputed facts are as follows. Bruce Ishman was an employee of Featherlite, Inc. (Featherlite). Under the policy existing at the time of his hire and through December 2004, the anniversary of his hire governed the amount of vacation and personal time he earned.

Ishman's six-year anniversary with Featherlite fell on June 1, 2004. At that time, he earned 160 hours of vacation leave and twenty-four hours of personal/sick leave to be taken during the following [*2] twelve-month period.

On December 30, 2004, Featherlite changed its policies regarding vacation and personal/sick leave. Effective January 1, 2005, the anniversary of an employee's hire no longer controlled. Instead, all employees were to accrue and use their time on a calendar-year basis. Employees were advised that any balance of vacation and personal leave was cancelled.

Shortly thereafter, in response to employee comments, Featherlite decided to pro-rate, rather than cancel, vacation and personal/sick leave earned in 2004. The company counted the days remaining in 2004 after the employee's anniversary date, divided that number by the number of days in the year, multiplied that figure by the number of vacation hours the employee earned in 2004, and arrived at the number of vacation hours to which the employee was entitled for 2004. The company then subtracted the number of vacation hours used by the employee from the anniversary date through December

31, 2004. The balance was carried over to 2005. Featherlite used the same formula to calculate the number of personal/sick hours to be carried over.

Featherlite determined that Ishman earned ninety-four hours of vacation leave between June [*3] 1, 2004, and December 31, 2004. He used eighty-eight hours of vacation during this period, leaving six hours to carry over into 2005. Featherlite made the same calculation with respect to Ishman's personal/sick days and determined he had 3.25 hours to carry forward.

Ishman took issue with this calculation. He asserted that he had 160 hours of vacation to use as of June 1, 2004, and he only used eighty-eight hours through the remainder of the year, leaving a seventy-two hour balance when Featherlite converted to its new policy. He sued Featherlite individually and on behalf of all others similarly situated alleging claims of breach of contract, nonpayment of wages under Iowa Code chapter 91A (2005), and fraud.

Ishman subsequently moved for class certification. That motion was granted and the ruling was affirmed on appeal. *Ishman v. Featherlite, Inc.*, No. 05-1760, 2006 Iowa App. LEXIS 1812 (Iowa Ct. App. Nov. 30, 2006).

Next, Featherlite moved for summary judgment and sought decertification of the class. Ishman filed a resistance and an affidavit but no statement of disputed facts. Following a hearing, the district court granted the summary judgment motion and decertified the class. This appeal followed.

***II. Summary*** [*4] ***Judgment Ruling***

Summary judgment is properly granted when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Iowa R. Civ. P. 1.981(3). The moving party has the burden of showing the material issues of fact are undisputed. *McIlravy v. North River Ins. Co.*, 653 N.W.2d 323, 328 (Iowa 2002). "Summary judgment is inappropriate if reasonable minds would differ on how the issue should be resolved. However, where the evidence compels only one reasonable conclusion, the question presented is one of law." *Swartzendruber v. Schimmel*, 613 N.W.2d 646, 649 (Iowa 2000) (citation omitted).

As a preliminary matter, we must determine whether Ishman appropriately resisted the summary judgment motion. As noted, he did not file the statement of disputed facts required by Iowa Rule of Civil Procedure 1.981(3). Featherlite argues that, as a result, its statement of undisputed facts should be deemed admitted. *See Rohlin Constr. Co. Inc. v. Lakes, Inc.*, 252 N.W.2d 403, 406 (Iowa 1977) ("Defendants responded to Rohlin's motion for summary judgment only by filing a resistance and supporting brief. Accordingly Rohlin's factual assertions are considered to [*5] be unchallenged."). This argument does not account for Ishman's submission of a series of exhibits and affidavits in support of his resistance. [1] Included among these documents was Ishman's affidavit, which challenged Featherlite's assertion that he and others did not lose vacation and personal/sick leave in the transition to the new policy. We conclude this affidavit was the equivalent of a statement of disputed facts. Accordingly, we decline Featherlite's invitation to deem its statement of undisputed facts admitted.

1 Although submitted several months after the summary judgment motion was filed, it appears that the deadlines for resisting the summary judgment were extended multiple times, making the submission timely.

Having said that, even if we were to accept Featherlite's assertion that Ishman's resistance to its motion was improper, we are not persuaded by its contention that this procedural deficiency automatically entitles it to judgment as a matter of law. As the court stated in *Rohlin,* an improper resistance simply means that a party "must then succeed, if he succeeds at all, not on the strength of his own case, for he has made none, but on the weakness of his adversary's." [*6] *Id.* at 406 (*quoting McCarney v. Des Moines Register & Tribune Co.*, 239 N.W.2d 152, 154 (Iowa 1976)).

As noted, Ishman attempted to generate a genuine issue of material fact on the question of whether he lost vacation and personal time in the transition to a new vacation policy. However, Ishman did not dispute the underlying figures used by Featherlite to calculate his vacation and personal sick time. He conceded that the company prorated the 160 hours of vacation time he earned as of June 1, 2004, and allowed him to carry over the balance of unused time. As these material facts are undisputed, the only question is whether they entitle Featherlite to judgment as a matter of law. We will turn to that question.

***A. Existence of a Contract.***

We begin with Ishman's breach-of-contract claim. Ishman was obligated to prove the existence of a contract. *Anderson v. Douglas & Lomason Co.*, 540 N.W.2d 277, 283 (Iowa 1995). On this question, the district court determined that Featherlite's employee handbook did not create a contract. The court stated:

> The issue as the Court sees it based on the record is whether or not the Featherlite employees had a vested interest in their vacation time under the old [*7] policy and whether or not the implementation of

> the new policy caused them to lose a portion of their vested interest. The employees of the Defendant company are non-unionized and are employees at will under Iowa law. The benefits available to the employees are determined by Defendant's Board of Directors and are memorialized in an employee handbook to be used for the benefit of uniformity in the implementation of rules and regulations pertaining to the employees of the company. The facts do not support a finding that the employee handbook rises to the level of a unilateral contract. This is true especially in light of the disclaimers written in to the acceptance page of the handbook acknowledged by Mr. Ishman and other similarly situated employees. No reasonable person reading the documentation could say otherwise.

On appeal, Ishman concedes that the employee handbook is not the basis of his contract claim. Instead, he premises his claim on "the contract of employment" that, he maintains, "existed independently of the policy manual." In his view, "employment at will is a unilateral contract of indeterminate duration."

Ishman's view is inconsistent with established authority. The employment [*8] at-will doctrine is a judicially created presumption utilized when parties to an employment contract are silent as to duration. *Anderson,* 540 N.W.2d at 281. The doctrine presumes that "[i]n the absence of a valid employment contract either party may terminate the relationship without consequence." *Id.*

It is undisputed that Ishman was not operating under a "valid employment contract." Therefore, Ishman had to establish that he fell within "two narrow deviations [from the employment at will doctrine]: tort liability when a discharge is in clear violation of a 'well-recognized and defined public policy of the State' and employee handbooks that meet the requirements for a unilateral contract." *Id.* at 282 (citation omitted). Ishman makes no public-policy argument for deviating from the employment-at-will doctrine and, as noted, he concedes that the employee handbook exception does not apply. Therefore, Ishman's breach-of-contract claim fails as a matter of law.

***B. Wage Claim***

Ishman also asserts he is entitled to compensation under Iowa's wage-payment law. *See* Iowa Code ch. 91A. Section 91A.3 provides that "[a]n employer shall pay all wages due its employees . . . ." Wages include "[v]acation, [*9] holiday, sick leave, and severance payments which are due an employee under an agreement with the employer or under a policy of the employer." Iowa Code § 91A.2(7)(b). Ishman argues that he and similarly situated employees are "due" vacation and sick/personal pay "under a policy of the employer." *Id.* [2] Featherlite responds that vacation pay and sick pay were not "due" until they were taken. Given the undisputed facts, we find it unnecessary to wade into a discussion of whether Ishman's 2004 vacation/personal time was due when he became entitled to it or when it was taken.

> 2 Ishman concedes there is no case law supporting his contention "that wages are due pursuant to a policy of an employer, not an express written contract with the employer." The case law addressing similar issues establishes the contrary. *Willets v. City of Creston,* 433 N.W.2d 58, 62 (Iowa Ct. App. 1988) (stating "[a]n employment contract terminable at will is subject to modification at any time by either party as a condition of its continuance"); *Moody v. Bogue,* 310 N.W.2d 655, 660-661 (Iowa Ct. App. 1981) (same).

Specifically, it is undisputed that Ishman was entitled to 160 hours of vacation time and twenty-four hours [*10] of personal time as of June 1, 2004, and that Featherlite afforded him a credit for the balance of the vacation he was owed as of June 1, 2004. It is also undisputed that, on January 1, 2005, he began accruing another 160 hours for the 2005 calendar year which he could take at any time subject to his supervisor's approval and subject to reimbursement of the un-accrued portion in the event of termination. The seventy-two hours of vacation time that he claimed he lost were in fact included in the carried-over hours and the new award for 2005.

Ishman declined to address the ramifications of the carried-over hours, arguing this change was "not really . . . relevant to the case." He also did not address the accrual of 2005 vacation time as of the first of the year. These unaddressed but undisputed facts establish as a matter of law that Ishman suffered no loss and Featherlite did not intentionally fail to pay him wages under Iowa Code chapter 91A. *See* Iowa Code § 91A.8.

Our resolution of this issue also resolves Ishman's third issue regarding damages.

***III. Disposition***

We affirm the district court's summary judgment ruling. In light of that disposition, we decline Ishman's request to reinstate [*11] the fraud claim and recertify the class.

**AFFIRMED.**

LEXSEE

**JOC, INC. T/A SUMMIT EXXON, et al., Plaintiffs, v. EXXONMOBIL OIL CORPORATION, and EXXON MOBIL CORPORATION, Defendants.**

**Civil Case No. 08-5344 (FSH)**

**UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY**

**2010 U.S. Dist. LEXIS 32305**

**April 1, 2010, Decided**
**April 1, 2010, Filed**

**NOTICE:** NOT FOR PUBLICATION

**COUNSEL:** [*1] For JOC INC., trading as SUMMIT EXXON, SUNG EEL CHANG AUTO, INC., trading as ASHWOOD EXXON, Plaintiffs: FREDERICK BENNO POLAK, LEAD ATTORNEY, POST, POLAK, GOODSELL, MACNEILL & STRAUCHLER, PA, ROSELAND, NJ.

For EXXONMOBIL OIL CORPORATION, Defendant: JOHN B. MCCUSKER, LEAD ATTORNEY, MCCUSKER, ANSELMI, ROSEN & CARVELLI, P.C., Florham Park, NJ; PAUL G. MCCUSKER, LEAD ATTORNEY, MCCUSKER, ANSLEMI, ROSEN & CARVELLI, P.C., Florham Park, NJ.

For EXXON MOBIL CORPORATION, Defendant: JOHN B. MCCUSKER, LEAD ATTORNEY, MCCUSKER, ANSELMI, ROSEN & CARVELLI, P.C., Florham Park, NJ.

**JUDGES:** Hon. Faith S. Hochberg, United States District Judge.

**OPINION BY:** Faith S. Hochberg

**OPINION**

**HOCHBERG, District Judge**

This matter comes before the Court upon Defendant Exxon Mobil Oil Corporation's ("Exxon") Motion to Dismiss the Complaint filed by Plaintiffs JOC Inc. t/a Summit Exxon ("JOC") and Sung Eel Chang Auto, Inc. t/a Ashwood Exxon ("Ashwood") for failure to state a claim upon which relief can be granted pursuant to Fed. R. Civ. P. 12(b)(6). This Court has reviewed the motion after oral argument being held before the Court on June 5, 2009 pursuant to Fed. R. Civ. P. 78. [1]

1 The parties in this case sought to defer a ruling on this motion because [*2] of a newly passed legislative enactment in New Jersey that applies to the sale of gas station franchises that was enacted on the day that the parties were in court for oral argument on this motion. In October 2009, after months of negotiation regarding the sale of the franchises at issue in this suit, the parties informed the Court that the settlement discussions had failed because Exxon could not move fast enough to execute a sale of these stations and the parties were no longer seeking a delay of the Court's ruling. On October 21, 2009, the Court ordered the parties to re-file this motion to conform to the oral argument held on June 5, 2009.

**I. Factual and Procedural Background**

Plaintiffs are dealers who operate Exxon-branded gas station franchises in New Jersey. They purchase gasoline from Exxon under written contracts called "PMPA Agreements." [2] JOC has been a franchisee of Exxon since 1986. On or about September 26, 2006, JOC and Exxon renewed the Franchise Agreement governing their relationship for the period January 1, 2007 through December 31, 2009. Ashwood has been a franchisee of Exxon since 1996. On or about November 9, 2005, Ashwood and Exxon renewed the Franchise Agreement [*3] governing their relationship for the period January 1, 2007 through February 28, 2009.

2 "PMPA" refers to the federal Petroleum Marketing Practices Act, which governs aspects of contracts entered into by gasoline suppliers and gasoline retailers. Plaintiffs are not pursuing any claims under the Act itself. Plaintiffs refer to

these agreements as Franchise Agreements. The terms will be used interchangeably herein.

Under each Plaintiff's PMPA Agreement with Exxon, Exxon exercises unilateral control over a number of key terms of the contractual relationship. For example, Exxon has the exclusive right to determine and change the wholesale gasoline price (the "dealer tank wagon" or "DTW" price) charged to Plaintiffs. Exxon also determines the quantities of gasoline that JOC and Ashwood are expected to purchase each year and the terms and conditions pursuant to which the gasoline is delivered. Both JOC and Ashwood lease their stations from Exxon, and Exxon exercises control over the terms of such leases.

With respect to DTW pricing, Exxon uses a "zone pricing" approach. Zone pricing is the practice of dividing stations into zones, and then adjusting wholesale prices in accordance with the prevailing [*4] rates of other stations in the zone. According to Plaintiffs, Exxon implements zone pricing with respect to all stations to which it supplies gasoline at DTW prices. Plaintiffs further allege that in its implementation of zone pricing, Exxon advised them that it reviews the prices being charged by non-Exxon branded stations in a given price zone, and then subtracts 14 cents per gallon from the prevailing price within that zone. They claim that Exxon expects Plaintiffs to operate on this 14-cent-margin, but that Exxon does not use the same margin in all price zones. Plaintiffs allege that Exxon's zone pricing has been implemented or applied in ways that have placed them at a financial disadvantage. [3]

> 3 Specifically, Plaintiffs challenge Exxon's use of different weighted average price margins in different zones because the ultimate price Exxon charges to stations in different price zones may be lower than that charged to JOC and Ashwood. Plaintiffs complain that Exxon has charged one independently owned and operated gas station nearby (although in a different zone) DTW prices that were as much as seven cents per gallon less than those charged to JOC and Ashwood. Plaintiffs also complain [*5] that the DTW prices they have paid have been almost the same (1 to 7 cents less), and even greater at times, than *retail* prices of other Exxon-branded stations in other locations. Plaintiffs claim that they "cannot compete with stations that are able to sell gasoline at retail for less than or within 7 cents of what JOC and Ashwood are paying to purchase gasoline."

Beyond selling gasoline to franchisees like JOC and Ashwood, Exxon sells and delivers gasoline to dealer-owned and operated stations. Exxon also sells gasoline to jobbers, who distribute gasoline to stations, some of which are owned and/or operated by the jobbers, on their own and who bear the related distribution costs. Jobbers are able to purchase gasoline at the "rack" price, which is lower than the DTW prices charged to franchisees. This lower price is meant to account for the jobbers' absorption of the costs of picking up and delivering gasoline. [4] Exxon also supplies gasoline through inter-company transfers to stations that are owned and operated by Exxon.

> 4 Plaintiffs' Complaint focuses primarily on one particular jobber, Kimber Petroleum ("Kimber"), which entered into a distribution agreement with Exxon in March 2002. [*6] Kimber supplies at least three Exxon stations located near the JOC and Ashwood stations. Plaintiffs allege that the difference between the prices charged to them and to Kimber is greater than the cost of delivery and that the Kimber stations, as a result, pay less money than Plaintiffs do for the same grade and quality of gasoline and are, therefore, able to sell the gasoline at lower prices. According to Plaintiff, the three nearby Kimber-supplied stations charge significantly lower retail prices than JOC or Ashwood.

In addition to the sale of gasoline, both JOC and Ashwood offer automobile repair services through service bays at each station. Plaintiffs allege, however, that their bay services have suffered due to an increase in manufacturer or dealer-provided maintenance services. They complain that their service bays have not generated sufficient revenues to justify their continued operation. In apparent recognition of this trend, Exxon has itself converted the service stations at many of its locations into "On the Run" convenience stores. JOC and Ashwood allege that they have requested permission to convert their service bays into convenience stores but that those requests have [*7] been denied.

Plaintiffs allege that they are now unable to operate at a profit or remain economically viable under their current PMPA Agreements with Exxon. They claim that Exxon's "pricing practices ... over which [Exxon] has exclusive control, are preventing JOC and Ashwood from being able to charge competitive prices and from being profitable." [5] Furthermore, Plaintiffs allege that Exxon has engaged in a number of actions that demonstrate bad faith in response to their financial difficulties. At a meeting with Exxon representatives in August 2006, Plaintiffs requested permission to either convert their service bays into convenience stores or purchase their stations and become independent stations rather than franchisees. Both requests were ultimately denied. Plaintiffs also allege that they applied for Rent

Waivers in early 2007, but that their applications were unsuccessful.

> 5 Plaintiffs also allege that Exxon is well aware of their financial struggles, emphasizing that Exxon knows that neither Plaintiff is able to sell the Contract Volume of gasoline required each month and that because of other operating expenses that are also within Exxon's control, a 14-cent average weighted margin [*8] is insufficient to allow Plaintiffs to both cover operating expenses and generate a profit.

In response to this situation, Plaintiffs filed a Complaint on September 18, 2008 in Union County Superior Court, which was removed to this Court on October 29, 2008. Plaintiffs initially asserted four claims against Exxon and Defendant Exxon Mobil Corporation: (1) breach of contract pursuant to N.J.S.A. 12A:2-305; (2) breach of the implied covenant of good faith and fair dealing; (3) breach of New Jersey's Unfair Motor Fuels Practices Act (the "UMFPA") as codified at N.J.S.A. 56:6-17, et seq.; and (4) conspiracy to discriminate against Plaintiffs in the prices charged for gasoline.

Defendant moved to dismiss the Complaint in its entirety on November 20, 2008, but the motion was stayed pending resolution of Plaintiffs' motion to remand this proceeding to state court. Plaintiffs notified the Court on December 29, 2008 that they withdrew their motion to remand and voluntarily dismissed their claims against Exxon Mobil Corporation. The Court dismissed all claims against Defendant Exxon Mobil Corporation on January 9, 2009. The Court now considers Defendant Exxon's motion with respect to the remaining [*9] counts of Plaintiffs' Complaint.

## II. Standard of Review

To survive a Rule 12(b)(6) Motion to Dismiss, "factual allegations must be enough to raise a right to relief above the speculative level, on the assumption that all the allegations in the complaint are true even if doubtful in fact." *Bell Atlantic Corp. v. Twombly*, 550 U.S 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007). Furthermore, "[w]hile a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Id.* (internal citations and quotations omitted). According to the Third Circuit, "stating . . . a claim requires a complaint with enough factual matter (taken as true) to suggest the required element. This does not impose a probability requirement at the pleading stage, but instead simply calls for enough facts to raise a reasonable expectation that discovery will reveal evidence of the necessary element." *Phillips v. County of Allegheny*, 515 F.3d 224, 234 (3d Cir. 2008) (internal quotations omitted) (citing *Twombly*, 550 U.S. at 556).

Although [*10] a court does not need to credit a complaint's "bald assertions" or "legal conclusions," it must view all of the allegations in the complaint as well as all reasonable inferences that can be drawn therefrom in the light most favorable to the plaintiff. *Morse v. Lower Merion Sch. Dist.*, 132 F.3d 902, 906 (3d Cir. 1997) (citing *Rocks v. City of Philadelphia*, 868 F.2d 644, 645 (3d Cir. 1989)); *see also In re Burlington Coat Factory Sec. Litig.*, 114 F.3d 1410, 1429-30 (3d Cir. 1997). The Supreme Court recently held that "once a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint." *Twombly*, 550 U.S. at 563.

In evaluating a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6), the Court may consider only the Complaint, exhibits attached to the Complaint, matters of public record, and undisputedly authentic documents if the Plaintiff's claims are based on those documents. *Pension Guaranty Corp. v. White Consol. Indus.*, 998 F.2d 1192, 1196 (3d Cir. 1992).

## III. Analysis

### A. Count 1: Breach of Contract

Plaintiffs allege that Exxon breached its PMPA Agreements in violation of N.J.S.A. 12A:2-305. This provision, New Jersey's [*11] codification of section 2-305 of the Uniform Commercial Code (the "U.C.C."), establishes that in contracts containing open price terms, "[a] price to be fixed by the seller or by the buyer means a price for him to fix in good faith." N.J.S.A. 12A:2-305(2). [6] Plaintiffs allege that Exxon breached its obligations under this provision "because the DTW prices that JOC and Ashwood are charged by [Exxon] are unjustly discriminatory, set in bad faith, and set with the intention of impairing the ability of JOC and Ashwood to compete and/or perform profitably."

> 6 The comments to this provision further explain that it "rejects the uncommercial idea that an agreement that the seller may fix the price means that he may fix any price he may wish by the express qualification that the price so fixed must be fixed in good faith. Good faith includes observance of reasonable commercial standards of fair dealing in the trade if the party is a merchant. (Section 2-103). But in the normal case a 'posted price' or a future seller's or buyer's 'given price,' 'price in effect,' 'market price,' or the like satisfies the good faith requirement."

Defendant moves to dismiss this count on a number of grounds. Most [*12] clearly, Exxon argues that Plaintiffs' contract-based claims should be dismissed for failure to comply with the notice provisions of the New Jersey Commercial Code. N.J.S.A. 12A:2-607(3)(a) establishes that buyers, such as JOC and Ashwood, who have accepted tender of the goods being sold "must within a reasonable time after he discovers or should have discovered any breach notify the seller of breach or be barred from any remedy." Defendant argues that Plaintiffs seek to hold Defendant liable for a breach of the PMPA Agreements but have failed to allege that they gave notice of such claims at all, let alone within a reasonable time after gasoline deliveries were accepted.

In response, Plaintiffs argue that the notice requirement is meant only to require a buyer to give notice to the seller where the goods delivered are non-conforming and does not apply to the instant contract claims, which are based upon a breach of good faith in setting an open price term. Moreover, Plaintiffs claim that the Complaint clearly alleges that notice was sufficiently provided by asserting that "[i]n early 2006 JOC and Ashwood reached out to [Exxon] and explained that due to the factors detailed in the preceding [*13] paragraphs [which includes the discriminatory DTW prices], they were unable to cover their operating expenses or achieve a profit."

The comments accompanying this provision explain that "the rule of requiring notification is designed to defeat commercial bad faith, not to deprive a good faith consumer of his remedy." Furthermore, buyers enjoy a degree of flexibility with respect to the form of notice that must be given:

> The content of the notification need merely be sufficient to let the seller know that the transaction is still troublesome and must be watched. There is no reason to require that the notification which saves the buyer's rights under this section must include a clear statement of all the objections that will be relied on by the buyer, as under the section covering statements of defects upon rejection (Section 2-605). [*14] Nor is there reason for requiring the notification to be a claim for damages or of any threatened litigation or other resort to a remedy. The notification which saves the buyer's rights under this Article need only be such as informs the seller that the transaction is claimed to involve a breach, and thus opens the way for normal settlement through negotiation.

N.J.S.A. 12A:2-607(3)(a), Comment 4.

Nevertheless, despite this flexibility and Plaintiffs's arguments to the contrary, providing notice pursuant to this regulation is a condition precedent to filing any suit for breach of contract under Article 2 of the U.C.C. or its state counterparts. *See* *Caparrelli v. Rolling Greens, Inc.*, 39 N.J. 585, 593, 190 A.2d 369 (N.J. 1963) (observing that with the advent of the Uniform Sale of Goods Laws, "notice became an 'absolute condition' of an action for breach of warranty" for the sale of chattel); *Buff v. Giglio*, 124 N.J. Super. 94, 97, 304 A.2d 771 (N.J. Super. A.D. 1973) (explaining that while rejection of the goods is not a prerequisite to an action by the buyer, notification to the seller is).

Furthermore, courts have previously applied the notice requirements in proceedings alleging a breach of the obligation to set [*15] open price terms in good faith. *See* *Autry Petroleum Co. v. BP Products North America, Inc.*, 2006 U.S. Dist. LEXIS 25583, 2006 WL 1174443, *3 (M.D. Ga. 2006) Although the *Autry* Court ultimately concluded that plaintiffs there had sufficiently alleged compliance with Section 2-607, it also observed that notice was a precondition to the lawsuit, and that any complaint alleging a breach of Article 2 of the U.C.C. must include general averments to the effect that the condition had been satisfied. *See also Zourob Enters. Inc. v. ExxonMobil Corp.*, No. 03-307825-C2 (Cir. Ct. of Wayne Co., MI, Apr. 5, 2004).

Courts in this district have also previously held that Section 2-607 will bar suits alleging breach of contract if its requirements are not satisfied. The court in *In re: Ford Motor Co. Ignition Switch Products Liability Litigation* dismissed without prejudice the express warranty claims brought by a number of plaintiffs because "[n]owhere in the pleadings do any of these particular named plaintiffs claim to have given this required notice." 1997 U.S. Dist. LEXIS 24064, 2001 WL 1266317, *14 (D.N.J. 1997). The *Ford* Court, however, afforded plaintiffs an opportunity to amend the complaint to plead the required notice.

This Court finds similar deficiencies [*16] in Plaintiffs' Complaint. Generalized allegations that Exxon knew that these stations were struggling financially do not suffice as an assertion that notice of a breach of contract had been given. Plaintiffs have not alleged in the Complaint that they notified Exxon that they believed their PMPA Agreements had been breached as a result of the high prices or resulting financial difficulties.

Count 1 is dismissed without prejudice and with leave to amend the Complaint **by April 14, 2010** to plead that the required notice of breach of contract had been

given to Exxon within a reasonable time after the breach was discovered. [7]

> 7 Based on the evidence presented in Plaintiffs' supplemental papers in response to this motion, the Court notes that, if those facts are pled as discussed in the papers, Plaintiffs has a strong argument that it has met the notice requirement in N.J.S.A. 12A:2-607(3)(a). Defendant has also moved to dismiss Count 1 on the grounds that Plaintiffs have neither alleged conduct constituting bad faith under Section 2-305 of the New Jersey Commercial Code nor identified an express contract term constraining any of the pricing decisions made by Exxon. Because the Court dismisses [*17] Count 1 for failure to allege satisfaction of the U.C.C.'s notice provision, these arguments need not be addressed at this time, but Plaintiffs' amended pleadings shall be required to address any deficiencies raised in this matter as well. Because of the substantial delays in this case caused by the request of the parties to engage in settlement discussions and because fact discovery is set to close on June 19, 2010 and no further extensions will be granted, any further challenge addressed to either the "notice" or "bad faith" allegations of the Complaint shall solely be made in a Motion for Summary Judgment.

**B. Count 2: Breach of the Covenant of Good Faith and Fair Dealing**

Plaintiffs also claim that Defendant has breached the implied covenant of good faith and fair dealing by, among other actions: (1) setting DTW prices that make it difficult, if not impossible, for Plaintiffs to perform profitably; (2) setting Contract Volumes of gasoline sales that make it difficult, if not impossible, for Plaintiffs to perform profitably; (3) refusing to lower such prices; (4) refusing to allow Plaintiffs to convert their service bays into convenience stores or purchase their stations; and (5) refusing [*18] to grant JOC and Ashwood Rent Waivers. Plaintiffs further allege that Exxon's actions and inactions "demonstrate that [Exxon] is exercising its discretionary authority arbitrarily, unreasonably, or capriciously, knowing that by doing so, it is rendering it ... impossible for plaintiffs to meet their operating expenses and perform profitably." [8]

> 8 Compl. P 81.

Exxon argues that these claims must be dismissed because New Jersey Law does not recognize a separate cause of action for breach of the implied covenant of good faith and fair dealing. Although the New Jersey Commercial Code recognizes an implied duty of good faith and fair dealing in sales contracts, Exxon contends that this implied duty does not give rise to an independent cause of action.

In making these arguments, however, Exxon appears to ignore or misinterpret substantial case law to the contrary. Under New Jersey law, "every contract in New Jersey contains an implied covenant of good faith and fair dealing." *Sons of Thunder, Inc. v. Borden, Inc.*, 148 N.J. 396, 690 A.2d 575 (1997). Moreover, "a party's performance under a contract may breach [the] implied covenant even though that performance does not violate a pertinent express term." *Wilson v. Amerada Hess Corp.*, 168 N.J. 236, 244, 773 A.2d 1121 (N.J. 2001). [*19] Exxon concedes this point, but appears to argue that this principle is subsumed by the duty of good faith and fair dealing established by the U.C.C.

The New Jersey Supreme Court, however, has articulated a test for determining whether the implied covenant of good faith and fair dealing has been breached in very similar situations:

> [A] party exercising its right to use discretion in setting price under a contract breaches the duty of good faith and fair dealing if that party exercises its discretionary authority arbitrarily, unreasonably, or capriciously, with the objective of preventing the other party from receiving its reasonably expected fruits under the contract. Such risks clearly would be beyond the expectations of the parties at the formation of a contract when parties reasonably intend their business relationship to be mutually beneficial. They do not reasonably intend that one party would use the powers bestowed on it to destroy unilaterally the other's expectations without legitimate purpose.

*Wilson v. Amerada Hess Corp.*, 168 N.J. at 251 (emphasis added). In *Wilson,* the court specifically considered a claim, not for breach of the express terms of contract, but for breach of [*20] the implied covenant of good faith and fair dealing. [9] There, as here, the contract at issue was governed by the New Jersey Commercial Code. Courts have regularly allowed plaintiffs to pursue separate good faith and fair dealing claims in similar situations. *See Anil Enterprises v. Getty Petroleum Marketing, Inc.*, 2009 U.S. Dist. LEXIS 14175, 2009 WL 467844 (D.N.J. 2009); *Akshayraj, Inc. v. Getty Petroleum Marketing, Inc.*, 2007 U.S. Dist. LEXIS

15621, 2007 WL 708852 (D.N.J. 2007); *Bob's Shell, Inc. v. O'Connell Oil Associates, Inc.*, 2005 U.S. Dist. LEXIS 21318, 2005 WL 2365324 (D.Mass. 2005). *See also Flagler Automotive, Inc. v. Exxon Mobil Corp.*, 582 F.Supp.2d 367 (E.D.N.Y. 2008) (separately analyzing a Section 1-203 Implied Duty of Good Faith claim and a Section 2-305 Express Duty of Good Faith Claim).

> 9 Exxon's attempt to argue otherwise is somewhat disingenuous in that it relies primarily on a quotation taken out of context. The language Exxon has cited from *Wilson* relates more to "the appropriate force of the implied covenant of good faith and fair dealing in reviewing the actions of a contracting party expressly vested with unilateral discretionary authority over pricing" than it does to whether such a covenant is independently enforceable. *Wilson*, 773 A.2d at 245-46.

Plaintiffs [*21] here have specifically alleged that Defendant exercised its discretionary authority over DTW pricing, rental rates and other decisions arbitrarily, unreasonably, or capriciously. The terms "arbitrarily, unreasonably, or capriciously" connote bad faith. Plaintiffs have also alleged that Exxon knew that its DTW prices and other decisions prevented them from receiving the contractual rewards or benefits they reasonably expected. For the purposes of this motion to dismiss, Plaintiffs have stated a claim for a breach of the implied covenant of good faith and fair dealing. [10]

> 10 As one court recently observed, "the caselaw requires that Plaintiffs make a showing of bad motive, but it does not require that a claim must be summarily dismissed for its failure to include the words 'bad motive.'" *Akshayraj*, 2007 U.S. Dist. LEXIS 15621, 2007 WL 708852 at *8. Furthermore, the *Wilson* court specifically acknowledged that a plaintiff must be given a full opportunity to show a defendant's bad motive. *See Wilson*, 168 N.J. at 252-54.

Defendant is correct that this independent cause of action is actually a "contract" claim. It arises under contract law and is not a logical claim outside the framework of a contract between the parties. [*22] [11] However, because this claim arises under Article 1 of the U.C.C., not Article 2, the notice requirement that applied in Count 1 does not attach here and thus this claim stands.

> 11 *See, e.g., Wilson*, 168 N.J. at 251, as quoted *supra* at page 11; *Adams v. G.J. Creel and Sons, Inc.*, 320 S.C. 274, 277-79, 465 S.E.2d 84 (1985) (separate claims for breach of contract because of implied covenant of good faith and fair dealing and because of violation of Section 2-305). While Defendant notes that the official comment to the U.C.C. includes a statement regarding separate and independent claims, this section is not incorporated into the comment to the New Jersey codification of the U.C.C. In addition, the statement in the official comment, on its face, does not appear to prohibit this separate and independent claim from being brought as a breach of contract claim for violation of the implied covenant of good faith and fair dealing that is present in every contract, rather than for a breach of the express terms of the contract.

**C. Count 3: Breach of New Jersey's Unfair Motor Fuels Practices Act**

Finally, Plaintiffs allege that Exxon has breached the UMFPA by discriminating "directly and/or indirectly in the prices [*23] charged to JOC and Ashwood for the same grade and quality of gasoline as compared to that charged to independently owned and operated stations and Kimber Supplied Stations," with the intent to destroy or substantially lessen competition. In relevant part, the UMFPA prohibits distributors, refiners, wholesalers and suppliers from discriminating "either directly or indirectly, in tank wagon price between different retail dealers purchasing the same grade, quality or quantity of branded motor fuel, except to meet competition," if such discrimination is conducted with intent to injure competitors or destroy or substantially lessen competition. N.J.S.A. 56:6-22(c).

Defendant argues that this claim must be dismissed because the Act does not prevent Exxon from charging different prices to direct-supply dealers like Plaintiffs, who pay the DTW price, and jobbers like Kimber, who pay the rack price. Plaintiffs respond that the Act's reference to "indirect" discrimination "encompasses secondary-line claims of discrimination, i.e., such as discrimination between prices charged to Kimber and prices charged to plaintiffs." Plaintiff's Complaint alleges that "the price difference between that charged [*24] to Kimber and that charged to JOC and Ashwood for the same ... grade and quality of gasoline is, upon information and belief, greater than the cost of delivery. That means that the Kimber stations pay less money than JOC and Ashwood for the same grade and quality of gasoline..." Thus, Plaintiffs do allege in the Complaint, although certainly not as clearly as they alleged during oral argument, that the disparity in price between what the jobber was charged and what Plaintiffs were charged was more than the normal course of business would dictate, and was therefore motivated by a discriminatory motive.

Defendant also argues that, even if this Court finds allegations of price discrimination between Plaintiffs and the "independently owned and operated stations" referenced in general terms in the Complaint, this claim must be dismissed because Plaintiffs have failed to plead any facts that tend to establish either that differential pricing was implemented with the intent to destroy or substantially lessen competition or that it was implemented for purposes other than to meet competition. The Complaint, as written, states that Exxon "acted with [*25] the intent to destroy or substantially lessen competition."

Plaintiffs, in response, argue that Exxon was aware that it offered different prices to different sellers and that it controlled Plaintiffs' operating costs, and was, thereby, allegedly responsible for their financial problems. This, Plaintiffs argue, can support an inference that Exxon acted with the intent to destroy or lessen competition. [12]

12 At oral argument, Plaintiffs also argued that the manner in which Exxon has implemented zone pricing has prevented them from setting competitive retail prices.

The allegations that are made in the Complaint, as written, do not rise to the level of supporting an inference that Exxon was implementing its policies in a discriminatory manner. Plaintiffs have not alleged in the Complaint facts beyond a speculative level that tend to establish that Exxon established the zone pricing system, or any form of differential pricing, with the intent to restrain competition. As a result, Plaintiffs have not stated a claim under the UMFPA; Count 3 is dismissed without prejudice and with leave to amend the Complaint **by April 14, 2010** to plead with greater clarity that Exxon implemented its zone pricing [*26] and other policies in a way that was designed to discriminate and with the intent to restrain competition. [13]

13 Counsel for Plaintiffs, at oral argument, asserted that Plaintiffs were attempting to make the allegation that Exxon was in fact "gerrymandering" its price zones, such that similarly situated retailers two miles away were being charged up to 30 cents less per unit of gas, in order to discriminate against these two stations and drive them out of business. See Tr. of Oral Argument June 4, 2009 at 77:17 - 80:21. If so pled in an amended complaint, the Court would be inclined to permit this count to proceed, subject to renewed challenge upon a Motion for Summary Judgment.

**IV. Conclusion**

For the reasons given above, the Court grants Defendant's Motion to Dismiss in part and denies Defendant's Motion to Dismiss in part. An appropriate Order will issue.

**/s/ Faith S. Hochberg**

Hon. Faith S. Hochberg, U.S.D.J.

LEXSEE

**JOY SYSTEMS, Plaintiff, v. ADT SECURITY SERVICES, INC., Defendants.**

**Civ. No. 07-3579 (GEB)**

**UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY**

**2008 U.S. Dist. LEXIS 17715**

**March 6, 2008, Decided**
**March 7, 2008, Filed**

**NOTICE:** NOT FOR PUBLICATION

**COUNSEL:** [*1] For **JOY SYSTEMS, INC., Plaintiff: WILLIAM J. PINILIS,** *LEAD ATTORNEY,* PINILIS HALPERN, LLP, MORRISTOWN, NJ.

For **ADT SECURITY SERVICES, INC., Defendant: NEIL M. DAY,** *LEAD ATTORNEY,* COUGHLIN DUFFY LLP, MORRISTOWN, NJ.

**JUDGES:** GARRETT E. BROWN, JR., U.S.D.J.

**OPINION BY:** GARRETT E. BROWN, JR.

**OPINION**

**MEMORANDUM OPINION**

**BROWN, Chief Judge**

This matter comes before the Court upon the motion of ADT Security Systems Inc., ("Defendant") to dismiss Joy Systems' ("Plaintiff") complaint for failure to state a claim pursuant to Federal Rule of Civil Procedure 12(b)(6). The Court has reviewed the parties' submissions and decided the motion without oral argument pursuant to Federal Rule of Civil Procedure 78. For the reasons set forth below the Court will grant Defendant's motion.

**I. BACKGROUND**

Plaintiff alleges that on October 31, 2003, it entered into a contract with Defendant in which Defendant agreed to install a security system at Plaintiff's warehouse, located in Miami, Florida. (Plaint. Opp'n. at 2.) Plaintiff further states that Defendant "induced [Plaintiff] to enter into the agreement by representing that [it] would provide central station signal and notification service and 24-hour monitoring." (*Id.*) Plaintiff maintains that [*2] said representations were reflected in a contract as well as "in a document entitled ADT Security Services Certificate of Security System Installation." (*Id.*)

Plaintiff alleges that on the evening of June 21, 2006, its warehouse was burglarized. According to Plaintiff, when it notified Defendant the next day, it discovered that its alarm system "had not been connected to central station [and] there had been no record of [its] alarm registering over the prior six months." (*Id.* at 3.) Plaintiff also contends that Defendant failed to provide it with the 24-hour monitoring, that Defendant had represented it would provide.

In the first count of Plaintiff's complaint, Plaintiff alleges that in soliciting business from Plaintiff, Defendant violated New Jersey's Consumer Fraud Act, N.J.S.A 56:8-2 ("CFA"). In Count II, Plaintiff alleges that Defendant breached its contract by failing to provide security services. In Count III, Plaintiff alleges that Defendant was unjustly enriched by receiving payments from Plaintiff without providing the contracted services. (Docket 07-3579 Entry No. 1, Ex. A ("Compl.").)

**II. DISCUSSION**

**A. Standard for a Motion to Dismiss under Federal Rule of Civil Procedure 12(b)(6)**

A [*3] motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) may be granted only if, accepting all well-pleaded allegations in the complaint as true and viewing them in the light most favorable to the plaintiff, a court finds that plaintiff has failed to set forth fair notice of what the claim is and the grounds upon which it rests. *Bell Atlantic Corp. v. Twombly,* 127 S.Ct. 1955, 1964, 167 L. Ed. 2d 929 (2007) (*citing Conley v. Gibson,* 355 U.S. 41, 47, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957)). A complaint will survive a motion under Rule 12(b)(6) if it states plausible grounds for plaintiff's entitlement to the relief sought. *Id.* at 1965-66

(abrogating Conley's standard that the "complaint should not be dismissed for failure to state a claim unless it appears beyond a doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief"). In other words, it must contain sufficient factual allegations to raise a right to relief above the speculative level. *Id.* at 1965. The issue before the Court "is not whether plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence in support of the claims." *Burlington Coat Factory Sec. Litig.*, 114 F.3d 1410, 1420 (3d Cir. 1997) [*4] (*quoting Scheuer v. Rhodes*, 416 U.S. 232, 236, 94 S. Ct. 1683, 40 L. Ed. 2d 90 (1974)). In evaluating a Rule 12(b)(6) motion to dismiss for failure to state a claim, a court may consider only the complaint, exhibits attached to the complaint, matters of public record, and undisputedly authentic documents if the complainant's claims are based upon those documents. *See Pension Benefit Guar. Corp. v. White Consol. Indus.*, 998 F.2d 1192, 1196 (3d Cir. 1993), cert. denied 510 U.S. 1042, 114 S. Ct. 687, 126 L. Ed. 2d 655 (U.S. 1994)(No. 93-661) .

**B. Application**

At the heart of this dispute is the validity and reach of an exculpatory clause appearing in the terms and conditions of the Agreement between the parties. The exculpatory clause provides:

> IT IS UNDERSTOOD THAT ADT IS NOT AN INSURER, THAT INSURANCE, IF ANY, SHALL BE OBTAINED BY THE CUSTOMER AND THAT THE AMOUNTS PAYABLE TO ADT HEREUNDER ARE BASED UPON THE VALUE OF THE SERVICES AND THE SCOPE OF LIABILITY AS SET FORTH AND ARE UNRELATED TO THE VALUE OF THE CUSTOMER'S PROPERTY OR PROPERTY OF OTHERS LOCATED IN CUSTOMER'S PREMISES. CUSTOMER AGREES TO LOOK EXCLUSIVELY TO CUSTOMER'S INSURER TO RECOVER FOR INJURIES OR DAMAGE IN THE EVENT OF ANY LOSS OR INJURY AND RELEASES AND WAIVES ALL RIGHT OF RECOVERY [*5] AGAINST ADT ARISING BY WAY OF SUBROGATION. ADT MAKES NO GUARANTY OR WARRANTY, INCLUDING ANY IMPLIED WARRANTY OF MERCHANTABILITY OR FITNESS, THAT THE SYSTEM OR SERVICES SUPPLIED WILL AVERT OR PREVENT OCCURRENCES OR THE CONSEQUENCES THEREFROM, WHICH THE SYSTEM OR SERVICE IS DESIGNED TO DETECT. IT IS IMPRACTICAL AND EXTREMELY DIFFICULT TO DETERMINE ACTUAL DAMAGES, IF ANY, WHICH MAY PROXIMATELY RESULT FROM FAILURE ON THE PART OF ADT TO PERFORM ANY OF ITS OBLIGATIONS HEREUNDER. THE CUSTOMER DOES NOT DESIRE THIS CONTRACT TO PROVIDE FOR FULL LIABILITY OF ADT AND AGREES THAT ADT SHALL BE EXEMPT FROM LIABILITY FOR LOSS, DAMAGE OR INJURY DUE DIRECTLY OR INDIRECTLY TO OCCURRENCES OR CONSEQUENCES THEREFROM, WHICH THE SERVICE OR SYSTEM IS DESIGNED TO DETECT OR AVERT; THAT IF ADT SHOULD BE FOUND LIABLE FOR LOSS, DAMAGE OR INJURY DUE TO A FAILURE OF SERVICE OR EQUIPMENT IN ANY RESPECT, ITS LIABILITY SHALL BE LIMITED TO A SUM EQUAL TO 10% OF THE ANNUAL SERVICE CHARGE OR $ 1,000, WHICHEVER IS GREATER, AS THE AGREED UPON DAMAGES AND NOT AS A PENALTY, AS THE EXCLUSIVE REMEDY; AND THAT THE PROVISIONS OF THE PARAGRAPH SHALL APPLY IF LOSS, DAMAGE OR INJURY, IRRESPECTIVE OF CAUSE OR ORIGIN, RESULTS DIRECTLY [*6] OR INDIRECTLY TO PERSON OR PROPERTY FROM PERFORMANCE OR NONPERFORMANCE OF OBLIGATIONS IMPOSED BY THIS CONTRACT OR FROM NEGLIGENCE, ACTIVE OR OTHERWISE, STRICT LIABILITY, VIOLATION OF ANY APPLICABLE CONSUMER PROTECTION LAW OR ANY OTHER ALLEGED FAULT ON THE PART OF ADT, ITS AGENTS OR EMPLOYEES.

(Docket 07-3579 Entry No. 6, Ex. A.)

Defendant argues that the above exculpatory clause in the agreement between the parties mandates the

dismissal of Plaintiff's claim. Defendant asserts that risk allocation clauses such as the one entered into between the parties in this case are routinely upheld because the nature of the industry renders alarm companies a "constant target for insurance carriers and commercial parties seeking consequential damages for losses an alarm company *did not cause,* such as the burglary in this case." ( Def. Br. at 4) (emphasis in original). Defendant adds that, as is customary for alarm companies, Defendant determined pricing for Plaintiff for based on the cost of the service it was providing, and not upon the value of the property being protected. According to Defendant, courts widely recognize that alarm companies would risk insolvency, if they were disabled from allocating [*7] risk through contract. (*Id.*)

Defendant argues that the express terms of the exculpatory clause above exempt it "from liability from damages to persons or property as a result of [Defendant's] performance or nonperformance or any contractual or common law duty [and] acknowledges that [it] is not an insurer." (*Id.* at 6-7.) Defendant adds that the exculpatory clause is valid because it has no adverse effect on the public's interest, Defendant was under no public duty to perform, and both parties to the contract maintained equal bargaining power. (*Id.* at 8-10.)

Defendant also argues that the CFA claim must be dismissed because it rests on nothing more than a breach of contract claim, and therefore falls short of constituting fraud under the statute. (*Id.* at 10-13.) Finally Defendant urges dismissal of Plaintiff's unjust enrichment claim, arguing that a claim for unjust enrichment cannot stand when as here, there is an adequate legal remedy through a valid contract. (*Id.* at 13-14.)

Plaintiff opposes Defendant's motion, arguing that the exculpatory clause in the Agreement does not protect Defendant with regard to Plaintiff's claims of willful, malicious , and fraudulent conduct. (Plaint. Opp'n [*8] at 5.) Plaintiff also argues that the exculpatory clause does not protect Defendant from "benefit-of-the-bargain contract damages, i.e., the difference in value between the system as installed and as represented." Defendant seems to assert that the contract's limitation on damages stemming from "a failure of service or equipment" does not apply here because Defendant never provided any service, and therefore it was not possible for the service to fail. (*Id.* at 6.) Defendant argues that it should be given the opportunity to obtain discovery so it can explore why the alarm system was not connected to central station and the twenty-four-hour monitoring was not in place. (*Id.*)

Plaintiff also argues that its CFA claim should stand because it is alleging that Defendant made affirmative misrepresentations to Plaintiff regarding the sale of "merchandise." (*Id.* at 8.) According to Plaintiff, Defendant committed an affirmative misrepresentation by: (1) inducing Plaintiff to purchase its services in representing that it would provide central station signal and notification service as well as 24-hour monitoring; (2) providing Plaintiff with a certificate confirming this understanding; and (3) then [*9] failing to install those features. (*Id.* at 9.)

The parties seem to be unclear as to whether New Jersey or Florida Law applies to the contract claim in this case. However, the law of both states recognizes a valid exculpatory clause. *See* *Synnex Corp. v. ADT Sec. Services, Inc.*, 394 N.J. Super. 577, 928 A.2d 37; *Ace Formal Wear v. Baker Protective Serv.*, 416 So.2d 8. Because Florida and New Jersey law are in harmony on this issue, the Court need not rule upon which state law governs. *See* *Lucker Mfg. v. Home Ins. Co.*, 23 F.3d 808, 813 (3d Cir. 1994). In fact Plaintiff does not dispute the validity of the exculpatory clause at issue in this case. The exculpatory clause in the contract provides that "the customer agrees to look exclusively to customer's insurer to recover for injuries or damage, in the event of any loss or injury and releases and waives all right of recovery against [Defendant]." The exculpatory clause further provides that Defendant "shall be exempt from liability for loss, damage, or injury due directly or indirectly to occurrences, or consequences therefrom which the service or system is designed to detect or avert." The Court finds that the relief Plaintiff seeks for Defendant's [*10] alleged failure to perform the services agreed to in the contract, is barred by the clear language of the exculpatory clause in the agreement. As such, Plaintiff's breach of contract claim cannot stand. [1]

1 This Court does not rule upon whether Defendant may be liable to Plaintiff for "a sum equal to 10% of the annual service charge or $ 1,000" pursuant to paragraph E of the agreement because said amount does not meet the required minimum amount in controversy. *See* 28 USCS § 1332(a).

Plaintiff's CFA claim also fails as a matter of law. While plaintiff pleads legal conclusions in its complaint in support of its CFA claim -- specifically that "Defendant[] directed and employed an unconscionable commercial practice, deception, false promise, omission and/or misrepresentation," the underlying facts alleged in Plaintiff's complaint to support this claim actually sound in breach of contract. (Compl. at P 7.) Specifically, Plaintiff alleges that "Defendant failed to properly install the alarm system it sold to Plaintiff on Plaintiff's Florida warehouse, such that the police and/or central offices of ADT were not contracted on the date of the burglary of Plaintiff's Florida warehouse." (*Id.*) [*11] Thus Plaintiff does not allege any facts to support its claim that

"Defendant[] directed and employed an unconscionable commercial practice, deception, false promise, omission and/or misrepresentation." (*See* Compl. at P 7.) In essence, Plaintiff again alleges that Defendant failed to perform on the contract. It is well settled that something more than a breach of contract is required to make up a valid claim under the CFA. *See* *Gennari v. Weichert Co. Realtors*, 148 N.J. 582, 691 A.2d 350 (N.J. 1997); *Barry by Ross v. New Jersey State Highway Authority*, 245 N.J. Super. 302, 309, 585 A.2d 420 (Ch. Div. 1990). As such, Plaintiff's CFA claim cannot stand.

Finally, Plaintiff does not dispute Defendant's argument that Plaintiff's unjust enrichment claim should be dismissed. The Court agrees with Defendant that Plaintiff's claim with regard to unjust enrichment fails as a matter of law. Unjust enrichment is an equitable remedy only available when there exists no contract to otherwise provide compensation. *Caputo v. Nice-Pak Products, Inc.*, 300 N.J. Super. 498, 506, 693 A.2d 494 (App. Div. 1997). Because a valid contract exists between the parties, Plaintiff's unjust enrichment claim cannot stand.

**III. CONCLUSION**

For the foregoing reasons, [*12] the Court will grant Defendant's motion to dismiss Plaintiff's claim. An appropriate form of Order accompanies this Opinion.

Dated: March 6, 2008

s/ Garrett E. Brown, Jr.

GARRETT E. BROWN, JR., U.S.D.J.

LEXSEE

**BALBIR KAUR and BALDEV SINGH, Plaintiffs, v. STANDEX INTERNATIONAL CORP., DICKERMAN POWER CUT-OFF SAWS, EVERETT INDUSTRIES, INC., B.F. PERKINS DIVISION OF ROEHLENS INDUSTRIES, IR INTERNATIONAL, ABC CORP. 1-3 (names being fictitious) & JOHN DOES 1-3 (names being fictitious), Defendants.**

**Civil Action No. 06-2425 (JAG)**

**UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY**

**2009 U.S. Dist. LEXIS 57670**

**July 6, 2009, Decided**
**July 7, 2009, Filed**

**NOTICE:** NOT FOR PUBLICATION

**COUNSEL:** [*1] For BALBIR KAUR, BALDEV SINGH, Plaintiffs: RONALD S. KAPLAN, LEAD ATTORNEY, LIVINGSTON, NJ.

For STANDEX INTERNATIONAL CORP., B.F. PERKINS DIVISION OF ROEHLENS INDUSTRIES, IR INTERNATIONAL, Defendants: JOSEPH K. COBUZIO, LEAD ATTORNEY, TOMPKINS, MCGUIRE, WACHENFELD & BARRY, LLP, NEWARK, NJ.

For B.F. PERKINS DIVISION OF ROEHLENS INDUSTRIES, IR INTERNATIONAL, STANDEX INTERNATIONAL CORP., Cross Defendants: JOSEPH K. COBUZIO, LEAD ATTORNEY, TOMPKINS, MCGUIRE, WACHENFELD & BARRY, LLP, NEWARK, NJ.

**JUDGES:** JOSEPH A. GREENAWAY, JR., U.S.D.J.

**OPINION BY:** JOSEPH A. GREENAWAY, JR.

**OPINION**

**GREENAWAY, JR., U.S.D.J.**

This matter comes before this Court on the motion of defendants, Standex International Corporation and certain of it subsidiaries, IR International, Inc., and BF Perkins, Inc. [1], (collectively "Defendants"), for summary judgment, pursuant to FED. R. CIV. P. 56, against plaintiff, Balbir Kaur ("Plaintiff Kaur"), and her husband, Baldev Singh, (collectively, "Plaintiffs"). For the reasons set forth below, Defendants' motion is granted in part, and denied in part.

1 Defendant BF Perkins was improperly named as B.F. Perkins Division of Roehlens Industries.

**I. FACTUAL BACKGROUND**

The following facts are undisputed unless otherwise [*2] noted. The instant action stems from an injury sustained by Plaintiff Kaur to her right hand, in the course of her employment with Petro Extrusion Technologies ("Petro"), a plastic extrusion company in Garwood, New Jersey. (Defendants' Statement of Material Facts ("Def. 56.1 Stmt."), P 2; Plaintiffs' Response to Defendants' Statement of Material Facts ("Pl. Response"), P 2.)

At the time of the accident, Plaintiff Kaur was employed by Petro as a machine operator. (Complaint, p. 1.) On May 2, 2004, Plaintiff Kaur's hand came in contact with a rotating saw blade. (Def. 56.1 Stmt., P 3; Pl. Response, P 3.) The saw blade was an Everett(R) Cut-Off Saw, manufactured by Everett Industries, Inc. (See id.) Plaintiff Kaur contends that the saw blade was purchased by Dickerman Power Cut-Off Saws [2] and used as a component in the "Automatic Dickerman Machine." (Pl. Response, P 3.) The Automatic Dickerman Machine is a semiautomatic, cut-to-length tube cutting machine. (Def. 56.1 Stmt., P 3; Pl. Response, P 3.) It is designed as a semi-automatic cut-off saw equipped with a pneumatic feed. (Def. 56.1 Stmt., P 5; Pl. Response, P 5.) The feed system is comprised of three clamps, two of which are stationary. [*3] (Id.) The stationary clamps are located on either side of the saw blade. (Def. 56.1 Stmt., P 6; Pl. Response, P 6.) These clamps close simultaneously to

hold the tubing material in place, while the saw blade moves downward from its hinge point, located on the back of the blade arm. (Id.) After the cut is completed, the stationary clamps open, while the third clamp closes and pushes the product forward, allowing the cutting cycle to be repeated. (Def. 56.1 Stmt., P 7; Pl. Response, P 7.)

2 Defendant Standex International Corp. acquired the Dickerman line of cut-off saws in an asset purchase sale in 1968. The Dickerman line was then sold by Standex in 1978. According to Defendants, the machine at issue in this case was purchased in April 1976, by Plaintiff Kaur's employer, Petro. (Def. 56.1 Stmt., P 3, n.3.)

Defendants contend that this feed system allowed for operation of the machine, without the need for machine operators to place their hands into the immediate area of the saw blade, presumably to advance the cut product manually. (Def. 56.1 Stmt., P 7) (citing deposition transcript of Alan Pinsky, Chief Engineer for Petro, Ex. C, attached to the Certification of Joseph K. Cobuzio ("Cobuzio [*4] Cert.").) Defendants also assert that the machine's controls are located in such a way as to permit its operation without placing the operator in a potentially dangerous situation. (Def. 56.1 Stmt., P 8.) Plaintiffs deny both of Defendants' statements. (Pl. Response, P 7, 8.)

In its original state, the Everett(R) Cut-Off Saw has guards surrounding a large portion, if not the entirety of the blade. (Def. 56.1 Stmt., P 9; Pl. Response, P 9.) In manufacturing the Automatic Dickerman Machine, Dickerman modified the original guard design by removing a portion of the bottom to accommodate the pneumatic feed clamps. (Def. 56.1 Stmt., P 10; Pl. Response, P 10.)

At the time of the accident, Plaintiff Kaur was inserting a new length of tubing into the machine. [3] (Def. 56.1 Stmt., P 11; Pl. Response, P 11.) Defendants contend that Plaintiff Kaur has a vague and insufficient recollection of the accident, and has been unable to describe precisely how the accident occurred, or what position the machine was in when she was injured. (Def. 56.1 Stmt., P 15.) Plaintiff Kaur refutes Defendants' characterization of her recollection, which Plaintiff Kaur claims was gleaned from discrete deposition excerpts, [*5] and not the entirety of the record. (See Pl. Response, P 15; Plaintiffs' Brief in Opposition to the Motion for Summary Judgment ("Pl. Opp. Br."), p. 6.) Plaintiff Kaur did recall that "[h]er hand slipped and came in contact with the rotating blade." (Pl. Response, P 15.)

3 The parties dispute whether Plaintiff Kaur employed proper safety procedures while operating the machine. Nonetheless, the parties agree that an analysis of Plaintiff Kaur's misuse of the machine is not appropriate at this juncture. (See Defendants' Reply Brief in Support of the Motion for Summary Judgment ("Def. Reply Br."), p. 5, n.4.) Thus, this Court need not, nor has it been asked to, resolve any dispute related to misuse or comparative negligence.

## II. PROCEDURAL POSTURE

Plaintiffs filed their initial complaint with the Superior Court of New Jersey, Law Division, Union County, asserting causes of action for strict liability (Count I), breach of warranty (Count II), negligent design and negligent manufacture (Count III), [4] and loss of consortium (Count IV). On May 25, 2006, Defendants filed a Notice of Removal with this Court. Jurisdiction is proper with this Court, pursuant to this Court's diversity jurisdiction, [*6] under 28 U.S.C. § 1332(a). Plaintiffs' and Defendants' citizenship is diverse, and the amount in controversy exceeds $ 75,000.00.

4 Although Plaintiffs' Complaint details various common law personal injury claims, such claims have been subsumed under the Products Liability Act ("PLA") in New Jersey. Under N.J. Stat. Ann. § 2A:58C-1, "any claim or action brought by a claimant for harm caused by a product, irrespective of the theory underlying the claim, except actions for harm caused by breach of an express warranty" falls under the term "products liability action." "The PLA is the exclusive remedy for personal injury claims arising out of product use." Koruba v. American Honda Motor Co., Inc., 396 N.J. Super. 517, 935 A.2d 787, 795 (N.J. Super. Ct. App. Div. 2007) (citation omitted) (noting further that "negligence is not a basis for liability under the PLA."); see also Canty v. Ever-Last Supply Co., 296 N.J. Super. 68, 685 A.2d 1365, 1371 (N.J. Super. Ct. Law Div. 1996) (dismissing plaintiffs' common law negligence claims because they are superseded by state legislation); "[T]he causes of action for negligence, strict liability, and implied warranty have been consolidated into a single product liability cause of action, [pursuant [*7] to the PLA]." Green v. General Motors Corp., 310 N.J. Super. 507, 709 A.2d 205, 209 (N.J. Super. Ct. App. Div. 1998) (citation omitted).

Under the PLA,

> A manufacturer or seller of a product shall be liable in a product liability action only if the claimant

> proves by a preponderance of the evidence that the product causing the harm was not reasonably fit, suitable or safe for its intended purpose because it:
>
> a. deviated from the design specifications, formulae, or performance standards of the manufacturer or from otherwise identical units manufactured to the same manufacturing specifications or formulae, or
>
> b. failed to contain adequate warnings or instructions, or
>
> c. was designed in a defective manner.

N.J. Stat. Ann. § 2A:58C-2.

In other words, a plaintiff's claims under the PLA must allege a manufacturing defect, failure to warn, and/or a design or product defect. Here, Plaintiffs' Complaint articulates three claims, which are not framed as PLA claims. The parameters of the PLA require that these claims not survive in their current form. Counts I and II alleging strict liability and breach of warranty, respectively, are not cognizable under the PLA, because they do not assert claims for a manufacturing defect, [*8] failure to warn, or design defect, as noted above. Count III, which articulates negligent design and negligent manufacturing claims is likewise not cognizable under New Jersey law, unless analyzed as a PLA claim; specifically, a manufacturing or design defect claim. This Court shall apply the PLA's analysis to Count III.

Discovery was conducted in the instant matter. Thereafter, Defendants moved for summary judgment on all of Plaintiffs' claims. Defendants posit that Plaintiffs have failed to put forth evidence that the Automatic Dickerman Machine suffers from a design defect or a manufacturing defect. [5] Defendant also asserts that Plaintiffs fail to put forth any evidence regarding the "failure to warn" claim. Plaintiffs concede that there is no evidence supporting the failure to warn claim. (See Pl. Opp. Br., p. 5.) Defendants are entitled to summary judgment as to that claim. Plaintiffs oppose Defendants' motion for summary judgment as to the design defect claim.

5 This Court finds that Defendants are entitled to summary judgment as to any claim for manufacturing defect. In New Jersey, if a product deviates from a manufacturer's specifications, and that deviation causes an individual [*9] injury, the manufacturer will be liable. O'Brien v. Muskin Corp., 94 N.J. 169, 463 A.2d 298, 304 (N.J. 1983). There is no evidence in the record that the Everett(R) Cut-Off Saw or the Automatic Dickerman Machine deviated from manufacturer specifications. Plaintiffs do not contest this in their submission to the Court.

## III. CHOICE OF LAW

The parties agree that New Jersey substantive law governs this personal injury action. This Court agrees. A district court sitting in diversity jurisdiction over state law claims applies the choice-of-law rules of the forum in which it sits, in this case, New Jersey. See Warner v. Auberge Gray Rocks Inn, Ltee., 827 F.2d 938, 939-40 (3d Cir. 1987) (quoting Klaxon v. Stentor Elec. Mfg. Co., 313 U.S. 487, 61 S. Ct. 1020, 85 L. Ed. 1477 (1941)).

New Jersey employs the "governmental-interest" choice-of-law test for tort claims, applying the law of "the state with the greatest interest in governing the particular issue" in the underlying litigation. See Marks v. Struble, 347 F. Supp. 2d 136, 142 (D.N.J. 2004) (citing Veazey v. Doremus, 103 N.J. 244, 510 A.2d 1187 (N.J. 1986)). New Jersey has the most substantial interest in the outcome of this litigation. Plaintiffs are New Jersey residents. The Automatic Dickerman [*10] Machine was purchased in New Jersey. The accident involved here took place in New Jersey.

## IV. STANDARD OF REVIEW

Summary judgment is appropriate under FED. R. CIV. P. 56(c), when the moving party demonstrates that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Celotex Corp. v. Catrett, 477 U.S. 317, 322-23, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986); Carrasca v. Pomeroy, 313 F.3d 828, 832-33 (3d Cir. 2002). A factual dispute is genuine

if a reasonable jury could return a verdict for the non-movant, and is material if, under the substantive law, it would affect the outcome of the suit. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986); Justofin v. Metro. Life Ins. Co., 372 F.3d 517, 521 (3d Cir. 2004). This Court views "the facts in the light most favorable to the nonmoving party and draw[s] all inferences in that party's favor." Andreoli v. Gates, 482 F.3d 641, 647 (3d Cir. 2007) (internal citation omitted). "In considering a motion for summary judgment, a district court may not make credibility determinations or engage in any weighing of the evidence." Marino v. Indus. Crating Co., 358 F.3d 241, 247 (3d Cir. 2004) (quoting Anderson, 477 U.S. at 255).

When [*11] the moving party has the burden of proof on an issue at trial, that party has "the burden of supporting their motions 'with credible evidence . . . that would entitle [them] to a directed verdict if not controverted at trial.'" In re Bressman, 327 F.3d 229, 237 (3d Cir. 2003) (quoting Celotex, 477 U.S. at 331); see also United States v. Four Parcels of Real Prop., 941 F.2d 1428, 1438 (11th Cir. 1991) ("When the *moving* party has the burden of proof at trial, that party must show affirmatively the absence of a genuine issue of material fact: it . . . must show that, on all the essential elements of its case on which it bears the burden of proof at trial, no reasonable jury could find for the non-moving party." (emphasis in original) (internal citations omitted)). "[W]ith respect to an issue on which the nonmoving party bears the burden of proof . . . the burden on the moving party may be discharged by 'showing'-that is, pointing out to the district court-that there is an absence of evidence to support the nonmoving party's case." Celotex, 477 U.S. at 325.

Once the moving party has satisfied its initial burden, the party opposing the motion must establish that a genuine issue as to a material [*12] fact exists. Jersey Cent. Power & Light Co. v. Lacey Twp., 772 F.2d 1103, 1109 (3d Cir. 1985). The non-movant cannot rest on mere allegations and instead must present actual evidence that creates a genuine issue as to a material fact for trial. Anderson, 477 U.S. at 248; Siegel Transfer, Inc. v. Carrier Express, Inc., 54 F.3d 1125, 1130-31 (3d Cir. 1995). "[U]nsupported allegations . . . and pleadings are insufficient to repel summary judgment." Schoch v. First Fid. Bancorporation, 912 F.2d 654, 657 (3d Cir. 1990); see also FED. R. CIV. P. 56(e) (requiring nonmoving party to "set forth specific facts showing that there is a genuine issue for trial").

## V. DISCUSSION

Defendants seek the grant of summary judgment based on Plaintiffs' inability to establish its prima facie case for its product or design defect claim. "Generally, to succeed under a strict-liability design-defect theory, a plaintiff must prove that (1) the product was defective; (2) the defect existed when the product left the hands of the defendant; and (3) the defect [factually and proximately] caused the injury to a reasonably foreseeable user." Jurado v. W. Gear Works, 131 N.J. 375, 619 A.2d 1312, 1317 (N.J. 1993). [6]

6 A plaintiff must [*13] also show

> that the product is not reasonably fit, suitable and safe for its intended or reasonably foreseeable purposes. The decision whether a product is defective because it is not reasonably fit, suitable and safe for its intended purposes reflects a policy judgment under a risk-utility analysis. That analysis seeks to determine whether a particular product creates a risk of harm that outweighs its usefulness. Risk-utility analysis is especially appropriate when a product may function satisfactorily under one set of circumstances and yet, because of a possible design defect, present an unreasonable risk of injury to the user in other situations. Under a risk-utility analysis, a defendant may still be liable when a plaintiff misused the product, if the misuse was objectively foreseeable. The concept of foreseeable misuse extends to cases in which a product has been substantially altered from its original design. Hence, the plaintiff in a design-defect products-liability suit may succeed even if the product was misused, as long as the misuse or alteration was objectively foreseeable.
>
> Jurado v. W. Gear Works, 619 A.2d at 1317 (internal citations omitted).

Defendants argue that principal [*14] among Plaintiffs' deficiencies is the inability to create any issue as to a material fact on causation, specifically, proximate cause. In New Jersey,

> Even in a strict liability action, a plaintiff must prove causation. Causation generally consists of two elements. First, a plaintiff must show that the defendant's act or omission was the factual, or "but for," cause of the injury. Every occurrence related to an event such that, but for the event, the occurrence probably would not have happened is a factual cause of an injury. Second, even under a strict-liability standard, a plaintiff must prove that this factual cause was a proximate cause of the injury.

Cruz-Mendez v. ISU/Ins. Servs. of San Francisco, 156 N.J. 556, 722 A.2d 515, 524 (N.J. 1999).

"Generally, the determination of proximate cause is an issue of fact for the jury. Only in the rare case in which it appears to the court highly extraordinary that [the actor's conduct] should have brought about the harm, will courts remove the issue of proximate cause from the jury." Id., at 525 (internal quotation omitted).

Here, Defendants assert that Plaintiff Kaur fails to remember exactly how the accident occurred that resulted in her injury. Defendants [*15] posit that Plaintiff Kaur "has not been able to describe definitively how the accident occurred," effectively destroying any possibility of showing proximate cause. (Def. Reply Br., p. 9.) Indeed, it is Defendants' contention that "Plaintiff was only capable of describing the accident in generalities," and points to a specific two-sentence excerpt from Plaintiff Kaur's deposition testimony as proof. (Defendants' Brief in Support of the Motion for Summary Judgment, p. 4.) This excerpt, in total, reads, "As I pushed the pipe with the left hand and brought it with the right hand to put into the grip, somehow my hand slipped from that place further up. I don't know how it went there." (Id., citing Ex. D., attached to Cobuzio Cert., 48:6-9.) Defendants urge this Court conclude that this statement represents the entirety of Plaintiff Kaur's description of the accident, and that this statement is so inconclusive as to be dispositive of the motion. [7]

> 7 In asserting this argument, Defendants ignore record evidence, including further of Plaintiff Kaur's additional deposition statements on the same cited page. In essence, Defendants place undue weight on a single confused statement in the midst [*16] of a contentious deposition with a Hindi interpreter. The deposition transcript reflects numerous objections by Plaintiffs' counsel, disputes over translations, and confusion on the part of the interpreter. (Ex. B, attached to the Certification of Ronald S. Kaplan ("Kaplan Cert.").)

The record shows that Plaintiff Kaur does describe the accident with clarity and specificity, as reflected in both her deposition testimony and the Answers to Interrogatories. Plaintiff Kaur, only three questions after the statement cited by Defendants, provides further clarification:

> "Q. What I'm saying ma'am, do you recognize these blocks one and two as the clamps of the machine which grabs the pipe?
>
> A. When I was pushing the pipe, it should grip automatically, because since it did not grip, I went further up and my hand was caught into that area."

(Id. at 48:18-24.)

The Answers to Interrogatories offer an additional explanation of how the accident occurred:

> "While I was 'feeding' the plastic into the machine with my left hand and while making sure the plastic was properly on the machine with my right hand, my right hand was moving from left to right. The saw was to my right. The accident occurred when my right [*17] hand moved too far to my right causing it to be cut by the saw as it was coming down to cut the plastic. There was nothing to guard my hand from coming into contact with the saw."

(Ex. C, attached to Kaplan Cert., at P1.)

Plaintiff Kaur describes an accident in which her hand, moving from left to right to position the plastic for cutting, entered the cutting area of the blade and injured her. Plaintiff Kaur's statements raise a genuine issue as to a material fact - the proximate cause of Plaintiff Kaur's injury. Viewing the facts in the light most favorable to Plaintiffs, a reasonable jury could conclude that a defect in the design of the machine was the proximate cause of the injury to Plaintiff Kaur.

Defendants also assert that Plaintiff Kaur "cannot recall whether the cutting head was traveling up or down at the time she was injured." (Def. Reply Br. at 7.) This too, Defendants contend, is dispositive, because it negates the possibility of proving proximate cause. (Id.)

Defendants claim that Plaintiffs' proposed alternate designs might have prevented this injury if the accident had occurred while the cutting head was up, but not while it was down. (Id.) As support for this assertion, [*18] Defendants point to a reply to a hypothetical posed to Plaintiffs' expert, Thomas Cocchiola:

> Q. Okay. Hypothetically speaking, someone placed their hands under any saw blade, no matter how well guarded, they would be injured, would they not?
>
> A. Yes.
>
> Q. In fact, there's no guard in the world that could prevent that?
>
> A. And the saw was in a cutting cycle, yes.

(Ex. D, attached to Kaplan Cert., at 96:17-97:1.)

Defendants cite Fedorczyk v. Caribbean Cruise Lines, Ltd., 82 F.3d 69, 75 (3d Cir. 1996), in support of their argument that, in order to withstand summary judgment, Plaintiff Kaur must remember the position of the saw at the time of injury. The Fedorczyk plaintiff fell in a bathtub and claimed that the defendant cruise line had failed to equip the tub properly, although it had four anti-skid strips. Id. at 72. The Third Circuit upheld the district court's grant of summary judgment because the plaintiff could not recall whether she was standing on the anti-skid stripping when she fell. Id. at 74. If the Fedorczyk plaintiff had been standing on the strip, she would appropriately have been precluded from arguing that the lack of anti-skid stripping was the proximate cause of her injury.

Defendants [*19] attempt to analogize Fedorczyk to the instant action. Specifically, Defendants argue that Plaintiff Kaur's inability to recall the position of the saw at the time of her accident is likewise dispositive of the summary judgment motion, as in Fedorczyk. Further, Defendants argue that Plaintiffs' proposed alternative design would only be effective in preventing operator contact with the cutting head in the up, but not in the down, position. Because Plaintiff Kaur cannot remember the position of the saw, Defendants contend, she cannot conclusively state that the unguarded blade proximately caused her injury, or that an alternative design would have prevented the injury.

Plaintiffs' Engineering Report directly contradicts Defendants' argument. Plaintiffs' expert, Thomas Cocchiola, proposes safeguarding alternatives that would seem to prevent the hands of an operator from reaching the cutting area, regardless of whether the cutting head was up or down. (Ex. A, attached to Kaplan Cert., at 6.) "A point of operation enclosure guard could easily have been constructed . . . that permits visibility without allowing access to hazards." (Id.)

Defendants' summary judgment motion does not contemplate [*20] this safeguard alternative. Thus, a genuine issue as to a material fact necessarily exists regarding Plaintiffs' design defect allegation and whether the alleged defect proximately caused Plaintiff Kaur's injury. Defendants are not entitled to summary judgment as to this claim.

## VI. CONCLUSION

For the reasons stated above, Defendants' motion for summary judgment, pursuant to FED. R. CIV. P. 56, is granted as to Plaintiffs' failure to warn claims and manufacturing defect claims; and is denied as to Plaintiffs' remaining claims-design defect and loss of consortium.

Date: July 6, 2009

/s/ Joseph A. Greenaway, Jr.

JOSEPH A. GREENAWAY, JR., U.S.D.J.

LEXSEE

**DOROTHY KILLEEN v. HARMON GRAIN PRODUCTS, INC. & another** [1]

1 Oakdale Variety Store, Inc.

**[NO NUMBER IN ORIGINAL]**

**Appeals Court of Massachusetts, Norfolk**

**11 Mass. App. Ct. 20; 413 N.E.2d 767; 1980 Mass. App. LEXIS 1411; CCH Prod. Liab. Rep. P8857; 30 U.C.C. Rep. Serv. (Callaghan) 862**

**April 6, 1979, Argued**
**December 15, 1980, Decided**

**PRIOR HISTORY:** [***1] Civil action commenced in the Superior Court on August 13, 1974.

The case was tried before *Richardson*, J., a District Court judge sitting under statutory authority.

**DISPOSITION:** *So ordered.*

**COUNSEL:** *Mark G. Cerel*, for the plaintiff.

*John B. Johnson*, for Oakdale Variety Store, Inc.

*Louis Barsky*, for Harmon Grain Products, Inc.

**JUDGES:** Hale, C.J., Armstrong, & Dreben, JJ.

**OPINION BY:** ARMSTRONG

**OPINION**

[*21] [***3] [**769] In 1972, the plaintiff, then ten years old, fell from a jungle gym while she was sucking a cinnamon-flavored toothpick manufactured by the defendant Harmon Grain Products, Inc., and sold at retail by the defendant Oakdale Variety Store, Inc. She landed face down. The toothpick broke and punctured her lower lip in a manner that left her with a disfiguring linear scar three fourths of an inch long running horizontally beneath her lower lip. By her father she brought actions against both defendants for negligence and breach of warranty. [2] The trial judge directed verdicts in favor of the defendants, and the case comes to on the plaintiff's appeal from the ensuing judgment.

2 The complaint as amended contained ten counts, five by the minor plaintiff against, respectively, the manufacturer (Harmon Grain Products, Inc.), the retailer (Oakdale Variety Store, Inc.), the keeper of the variety store, the storekeeper's minor child, and a teacher at the school (who was alleged to have had the responsibility for supervising the activities of the minor plaintiff and her classmates), and five by the father of the minor plaintiff, against the same defendants, for the medical expenses which were incurred shortly after the accident and those which, according to the testimony of the plastic surgeon, must be incurred now in order to reduce the facial scar. All counts against the teacher, the storekeeper and the storekeeper's daughter were waived prior to trial. After trial, but before direction of verdicts, the father's remaining counts for consequential damages were similarly waived. As a result the minor plaintiff is the sole appellant.

[***4] The testimony most favorable to the plaintiff, supplemented by the manufacturer's answers to interrogatories (which were read in evidence), would have warranted the jury in finding the following facts. The plaintiff was attending fourth grade at the time of the accident. One of her classmates was the daughter of the proprietor of a small, family-run variety store (the defendant Oakdale Variety [*22] Store, Inc.) located about a quarter of a mile from the school. Occasionally the daughter would bring candy to the school which had been ordered by her friends; in such instances her father had instructed her to collect the purchase price and turn it over to the store. It was in that fashion that the cinnamon-flavored toothpick had come into the hands of the plaintiff.

The toothpicks were kept for sale in the candy case. They were packaged in glassine envelopes, roughly two by two and one half inches, which were designed with a

striped background and a small picture of a toothpick with a face, and which had as their most prominent feature the names of the product ("Hot Cinnamon Fire Pix") and the manufacturer, a message which said, "Stop Air Pollution -- Flavor Your Breath -- [***5] Refreshing," and another message which said, "Twelve Cinnamon Flavored Pix -- Imitation Flavors." The toothpicks looked like ordinary, untreated, wooden toothpicks of the common flat variety, narrow and pointed at one end and slightly broader and rounded at the other. The toothpicks were one of approximately five hundred candy items sold in the variety store and sold for a nickel. They were sometimes bought by adults but were bought more often by children. The proprietor bought them (and his entire line of candy items) from a wholesaler in Cambridge. The envelopes in which the toothpicks were packaged contained no warnings of any kind. Neither did the proprietor receive any warnings, oral or written, from the wholesaler. The proprietor had no dealings with the manufacturer.

A breach-of-warranty theory of recovery, alleged to sound under G. L. c. 106, §§ 2-314 (merchantability) or 2-315 (fitness for particular purpose), is of no pertinence to any set of findings permissible on the evidence. A contention is advanced that the particular toothpick which pierced the plaintiff's lip was improperly manufactured, being pointed at both ends, rather [**770] than being somewhat rounded [***6] at one end, [3] but if [*23] that is true there was nothing in the evidence to suggest that that peculiarity in the toothpick played any role in causing the plaintiff's injury. If the evidence can be said to have any tendency in this respect, it is that one of the broken ends pierced the lip. Besides, as the judge observed, toothpicks come in another common shape, with a rounded shaft and sharp points at both ends, and a consumer would presumably regard a toothpick with no pointed ends as defective rather than the other way around. Another contention is advanced that the toothpicks were marketed as candy but were not fit for that purpose because of the pointed ends. Such a theory would be plausible if a foreign object with sharp ends or edges were concealed in something to eat and cut the mouth of the unsuspecting consumer. But the toothpicks here were not marketed as candy, in the sense of something to be consumed in its entirety, but as toothpicks with a cinnamon flavor, made to suck, not to eat; and, as the product was exactly what it was represented to be, neither more nor less, with no hidden dangers or unpredictable propensities, the statutory warranties were not breached. [***7] See *Back* v. *Wickes Corp.*, 375 Mass. 633, 642 (1978), for the factors to be considered in determining design defects.

3 The plaintiff testified that the toothpick, when extracted from her mouth, had four pointed ends, two of which were presumably created when the toothpick broke.

We similarly reject any contention that such unreasonable danger inheres in toothpicks -- flavored or otherwise -- that the manufacturer or distributor is subjected to strict liability. See the discussion of Restatement (Second) of Torts § 402A (1965) in *Swartz* v. *General Motors Corp.*, 375 Mass. 628, 629-631 (1978). See also *Tibbetts* v. *Ford Motor Co.*, 4 Mass. App. Ct. 738, 741 (1976). Toothpicks, like pencils, pins, needles, knives, razor blades, nails, tools of most kinds, bottles and other objects made of glass, present obvious dangers to users, but they are not unreasonably dangerous, in part because the very obviousness of the danger puts the user on notice. It is part of normal upbringing that one learns [***8] in childhood to cope with the dangers posed by such useful everyday items. It is foreseeable that some will be careless in using such items and will be injured, but the policy of our law in such cases is not to shift the loss from [*24] the careless user to a blameless manufacturer or supplier. See *Coyne* v. *John S. Tilley Co.*, 368 Mass. 230, 234 (1975), and cases cited; *Roy* v. *Star Chopper Co.*, 584 F.2d 1124, 1129 (1st Cir. 1978), cert. denied, 440 U.S. 916 (1979); *Venezia* v. *Miller Brewing Co.*, 626 F.2d 188, 190-192 (1st Cir. 1980). Rather, liability of the manufacturer or supplier must be grounded in negligence, in a want of the care which a reasonable person should exercise in the circumstances. *Smith* v. *Ariens Co.*, 375 Mass. 620, 625-626 (1978).

Negligence, in products liability cases, typically consists of a failure in the design, manufacture, or inspection or a failure to warn the user of the dangers which he is apt to encounter in using the product. See *Schaeffer* v. *General Motors Corp.*, 372 Mass. 171, 173-174 (1977). None of these, we think, offers a plausible theory of liability in the instant case with respect to either the [***9] manufacturer or the retailer. Of the four, only the theory of failure to warn warrants discussion.

A duty to warn is not imposed by law as a mindless ritual. A warning is not required unless "the person on whom [the] duty rests has some reason to suppose a warning is needed." *Carney* v. *Bereault*, 348 Mass. 502, 506 (1965). *Schaeffer* v. *General Motors Corp.*, 372 Mass. at 174. "The duty to warn extends to concealed, nonobvious [**771] dangers." *Carlson* v. *American Safety Equip.*, 528 F.2d 384, 387 (1st Cir. 1976). The dangers inherent in toothpicks are both reasonable in scope and obvious to nearly all; as to such dangers, if a warning to the consumer is needed, it will almost certainly do no good. The plaintiff, incidentally, admitted that her parents had warned her against playing with sharp objects in her mouth; but whether they had or

not, we think that a manufacturer or retailer is justified, as matter of law, in making that assumption.

The plaintiff makes a more plausible contention, however, that candy-flavored toothpicks should not be sold to children, with or without warnings. The suggestion here is that substantial numbers of children can be [***10] counted to use the toothpicks unsafely, even though forewarned. Under [*25] Restatement (Second) of Torts § 390 (1965), which, with qualifications, states our own law ( *Leone* v. *Doran*, 363 Mass. 1, 13 n.3, *S.C.*, 363 Mass. 886 [1973], 369 Mass. 956 [1975]), "[o]ne who supplies . . . a chattel for the use of another whom the supplier knows . . . to be likely because of his youth . . . to use it in a manner involving unreasonable risk of physical harm to himself . . . is subject to liability for physical harm resulting to [him]."

From this vantage the case is analogous to dangerous toy cases. As a group those cases are not particularly helpful to the plaintiff; more often than not they result in exoneration of the supplier, provided that the toy functions properly and the dangers are obvious even to children. See, e.g., *Morris* v. *The Toy Box*, 204 Cal. App. 2d 468 (1962) (bow and arrows); *Bojorquez* v. *House of Toys, Inc.*, 62 Cal. App. 3d 930 (1976) (slingshot); *Smith* v. *Nussman*, 156 So. 2d 680 (Fla. App. 1963) (slingshot); *Pitts* v. *Basile*, 35 Ill. 2d 49 (1966) (darts); *Maramba* v. *Newman*, 82 Ill. App. 2d 95 (1967) (boomerang); [***11] *Rader* v. *Milton Bradley Co.*, 62 Misc. 2d 610 (Cir. Ct. N.Y. 1970) (a ball toy called "Time Bomb"); *Levis* v. *Zapolitz*, 72 N.J. Super. 168 (1972) (slingshot); *Strahlendorf* v. *Walgreen Co.*, 16 Wis. 2d 421 (1962) (toy plane with a rubber-band-and-stick catapult). But see *Victory Sparkler & Specialty Co.* v. *Latimer*, 53 F.2d 3 (8th Cir. 1931) (poisonous explosive pellet); *Moning* v. *Alfono*, 400 Mich. 425 (1977) (toy slingshot marketed specifically to children). It is equally true, however, that on close reading many of the cases turn out to be unhelpful to the defendants, because they are easily distinguishable on the facts. *Morris* v. *The Toy Box, Maramba* v. *Newman*, and *Stahlendorf* v. *Walgreen Co.*, all involved sales to adults, rather than direct to the children; in such a situation the retailer is normally justified in expecting that children too inexperienced to cope with the dangers will not be permitted the use of the toy without supervision. See *Moning* v. *Alfono*, at 456. In *Pitts* v. *Basile*, the case against the retailers who sold the darts directly to an eight year old child was not before the court on appeal, [***12] and the court expressly disavowed [*26] any ruling on the retailer's negligence. The wholesaler, against whom the evidence warranted a finding that he had packaged and marketed the darts in a manner calculated to induce children to buy them, was held not liable for want of causation, the evidence also having established that the manner of packaging and marketing was not responsible for the child's purchase of the darts. On the other hand, the *Moning* and *Victory Sparkler* cases represent holdings that suppliers may be liable for marketing toys directly to children too young to handle them with safety. The same is true, under our own cases, of nontoy items sold directly to children. In *Carter* v. *Towne*, 98 Mass. 567 (1868), *S.C.*, 103 Mass. 507 (1870), and *Pudlo* v. *Dubiel*, 273 Mass. 172 (1930), retailers were subject to tort liability for selling gunpowder (*Carter*) and B.B. shot (*Pudlo*) to minors. Such items are obviously more hazardous than toothpicks, measured by the severity of the injury which is likely to result from their misuse; but that is a matter of degree, and we see no reason in principle why a jury might not [**772] be permitted [***13] to return a finding of negligence against one who entrusts a young child with common objects such as, e.g., needles, knives, scissors or blades, glassware, or even toothpicks, the safe use of which requires precautions beyond what is reasonably to be expected of a child of his age. The boundaries within which evidence may be said to warrant a finding of negligence must be established not by logic but by experience, and, in determining those boundaries, we should not disregard the fact, gleaned from general experience, that parents and other adults commonly not only warn children of the dangers in playing with such objects but seek to deprive young children of ready access to them. It is not surprising that the plaintiff's mother, according to the testimony, reacted to the accident by angrily discarding the package with the remaining toothpicks, and it is reasonable to suppose that many parents would object to a retailer's selling their children candy-flavored toothpicks.

Against that common experience it seems to us impossible to conclude, as matter of law, that there is never negligence [*27] involved in retail sales of candy-flavored toothpicks to children, regardless of [***14] age. There must, of course, be a cut-off age, not because of its bearing on the child's contributory negligence, which does not act as a bar to recovery in this jurisdiction (see G. L. c. 231, § 85, as inserted by St. 1969, c. 761, § 1, and, by the terms of St. 1973, c. 1123, § 2, in effect as to causes of action arising prior to January 1, 1974), but because of its bearing on the question of due care of the retailer, who must, at some point, be justified as matter of law in assuming that his customer shoulders full responsibility for the proper use of the product. We think that cannot be said, as matter of law, of a ten year old child's use of candy-flavored toothpicks, although the case is borderline in this respect. There was testimony that the toothpicks retained their flavor for ten minutes, roughly, of sucking; and a jury would be warranted in finding it reasonably foreseeable that a ten year old child would not invariably refrain

from other activity during that period but might instead resume the rough and tumble play characteristic of the age, sucking the toothpick as absent-mindedly as one might chew gum. In this respect the toothpick is different from, for example, [***15] ice cream on a stick, or cotton candy, or candied apples on a stick, all of which involve some degree of concentration inconsistent with active play. [4]

> 4 For the same reason toothpicks differ from many of the dangerous toys discussed in the cases cited above: slingshots, darts, and bows and arrows require the child's active attention to trigger the moment of greatest danger. More dangerous, in this respect, are air guns or dart guns which may be left in a condition of readiness to shoot. It should be mentioned that in Massachusetts it is unlawful, by statute, to sell slingshots or fireworks. See G. L. c. 269, § 12; c. 148, § 39. It is also illegal to sell or, except for a parent, guardian or teacher, to furnish an air rifle or BB gun to a minor under eighteen. G. L. c. 269, § 12A.

We conclude, therefore, that the jury should have been permitted to consider the question of the retailer's negligence. We base this conclusion on the convergence of several factors which could be found from the evidence: [***16] that the sale was made directly to a child rather than to an adult who would presumably have provided supervision; [*28] that the toothpicks were sharp, shatterable, and equally sharp in shattered condition; that the toothpicks, by reason of their candy flavoring, were attractive to young children; that the manner and duration of their expected use posed a foreseeable danger; and that normal play for a child the plaintiff's age would involve rough and tumble inconsistent with safe use of the product.

It does not necessarily follow, however, that there was evidence of the manufacturer's negligence. Presumably, the manufacturer does not know of a sale to any particular customer. A comparable basis for a finding of negligence against a manufacturer would involve the manufacturer's marketing its product, through advertising, packaging, or distribution, in a manner calculated to induce direct purchases by children or others whose use of the product would involve unreasonable risk of [**773] injury. Without such a basis a finding of liability would imply that the manufacturer is subject to a legal duty to guard, by warnings or otherwise, against his products' falling into the [***17] hands of children, a duty which might reasonably be required with respect to a product that is particularly attractive to children and inherently hazardous (an example is the "spit devil" poisonous explosive in *Victory Sparkler & Specialty Co.* v. *Latimer, supra*, which was shaped like wrapped like a lozenge and had a pleasant flavor), but which, we hold, is not required with respect to such everyday objects as pins, needles, scissors, knives, toothpicks, or objects made of glass. Compare *Venezia* v. *Miller Brewing Co.*, 626 F.2d at 191-192; *Geary* v. *H.P. Hood & Sons*, 336 Mass. 369, 371 (1957).

Here the case against the manufacturer falls down. There was no evidence that Hot Cinnamon Fire Pix were advertised, to children or otherwise. The package is not suggestive of a product marketed to children and seems more obviously directed towards a more mature market, particularly by its appeal to "flavor your breath." Distribution through a wholesaler who also sold candy carries by itself no connotation of marketing particularly to children. There [*29] was nothing in the evidence to show that the manufacturer knew of sales to children or that such sales were [***18] a significant portion of the product's total market. The burden of proof on this point was, of course, the plaintiff's, and it was not met.

The judgment is reversed. The order allowing the motion for a directed verdict in favor of the defendant Harmon Grain Products, Inc., is affirmed. The order allowing the motion for a directed verdict in favor of the defendant Oakdale Variety Store, Inc., is reversed, and the case is to stand for retrial against that defendant.

*So ordered.*

LEXSEE

**BRIAN KING, Plaintiff(s), v. BANK OF AMERICA CORPORATION and BAC HOME LOANS SERVICING, Defendant(s).**

**CASE NUMBER: 09-12481**

**UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION**

**2009 U.S. Dist. LEXIS 82799**

**September 11, 2009, Decided**
**September 11, 2009, Filed**

**COUNSEL:** [*1] For Brian King, Plaintiff: Scott J. Najor, LEAD ATTORNEY, Najor and Associates, PC, Southfield, MI.

For Bank of America Corporation, Doing business as Bank of America, BAC Home Loans Servicing, Limited Partnership, Defendants: Brian C. Summerfield, Bodman, Troy, MI; Edward A. Frankfort, Bodman LLP, Troy, MI.

**JUDGES:** HONORABLE Victoria A. Roberts, United States District Judge.

**OPINION BY:** Victoria A. Roberts

**OPINION**

**ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION TO DISMISS**

**I. INTRODUCTION**

This matter is before the Court on Defendants' Motion to Dismiss Under Fed. R. Civ. P. 12(b)(6). (Doc. # 7). Defendants ask the Court to dismiss Brian King's Complaint in its entirety.

Defendants' motion is **GRANTED IN PART AND DENIED IN PART**.

**II. BACKGROUND AND PROCEDURAL HISTORY**

In December 2007, King obtained a $ 229,900.00 mortgage loan from Countrywide Bank (now owned by Bank of America) to purchase 33187 Glengary Court in Sterling Heights ("the Property"). The current servicer of the loan is BAC Home Loans Servicing.

The Uniform Residential Loan Application shows King's monthly income is $ 5,166.00 ($ 61,992.00 annually). King says this amount is substantially more than his true annual income of approximately $ 42,000.00. [*2] King says Defendants had a copy of his Income Tax Returns for 2005-2007, which reflect his true annual income.

In addition, King says Defendants falsely promised him he could sell the Property or refinance the loans in two years, if he had trouble paying the monthly loan payments. King eventually defaulted on the mortgage payments.

On May 18, 2009, King filed a Complaint in the Macomb County Circuit Court for: (1) an accounting; (2) violations of the Home Ownership and Equity Protection Act ("HOEPA"), 15 U.S.C. §§ 1639(b)(3) and 1639(h); (3) predatory lending; (4) violation of the Truth in Lending Act ("TILA"), 15 U.S.C. § 1601 *et seq.*; (5) fraudulent misrepresentation; (6) negligent misrepresentation; (7) violation of the Fair Credit Reporting Act ("FCRA"); (8) rescission of notes and mortgages; (9) reformation of notes and mortgages; (10) violation of the Mortgage Brokers, Lenders, and Servicers Licensing Act ("MBLSLA"), MCLA § 445.1672(b); (11) violation of Michigan's Usury Act, MCLA § 438.31; and (12) temporary restraining order/preliminary injunction.

The Court construes King's claims for rescission (count VIII), reformation (count IX), and temporary restraining order/preliminary [*3] injunction (count XII) as the relief he requests, along with monetary damages.

The case was removed to this Court on June 23, 2009.

**III. STANDARD OF REVIEW**

When reviewing a Fed. R. Civ. P. 12(b)(6) motion, the trial court "must construe the complaint liberally in the plaintiff's favor and accept as true all factual allegations and permissible inferences therein." *Gazette v. City of Pontiac*, 41 F.3d 1061, 1064 (6th Cir. 1994) (citing *Westlake v. Lucas*, 537 F.2d 857, 858 (6th Cir. 1976)); *see also Miller v. Currie*, 50 F.3d 373, 377 (6th Cir. 1995). Because a Fed. R. Civ. P. 12(b)(6) motion rests upon the pleadings rather than the evidence, "[i]t is not the function of the court [in ruling on such a motion] to weigh evidence or evaluate the credibility of witnesses." *Miller*, 50 F.3d at 377 (citing *Cameron v. Seitz*, 38 F.3d 264, 270 (6th Cir. 1994)).

However, while this standard is decidedly liberal, it requires more than the bare assertion of legal conclusions. *In re DeLorean Motor Co.*, 991 F.2d 1236, 1240 (6th Cir. 1993) (citing *Scheid v. Fanny Farmer Candy Shops, Inc.*, 859 F.2d 434, 436 (6th Cir. 1988)). Rather, the complaint must contain either direct or inferential allegations with regard [*4] to all the material elements to sustain recovery under some viable legal theory. *DeLorean*, 991 F.2d at 1240 (citations omitted). "[W]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged - but it has not 'show[n]' - 'that the pleader is entitled to relief.'" *Ashcroft v. Iqbal*, 129 S.Ct.1937, 1950, 173 L. Ed. 2d 868 (2009) (quoting Fed. R. Civ. P. 8(a)(2)).

## IV. APPLICABLE LAW AND ANALYSIS

### A. Accounting (Count I)

King says he needs an accounting to determine the amount he owes Defendants and/or the amount Defendants owe him. King says he previously demanded an accounting, but Defendants refuse to provide one.

"An accounting is unnecessary where discovery is sufficient to determine the amounts at issue." *Boyd v. Nelson Credit Centers, Inc.*, 132 Mich. App. 774, 779, 348 N.W.2d 25 (1984) (citing *Cyril J. Burke, Inc. v. Eddy & Co. Inc.*, 332 Mich. 300, 303, 51 N.W.2d 238 (1952)).

King does not allege that the financial transactions are so complex that ordinary discovery procedures would be inadequate. King can determine the amount he owes Defendants -- and vice versa -- through discovery.

King's claim for an accounting is dismissed.

### B. Violations of HOEPA (Count II)

#### 1. [*5] 15 U.S.C. § 1639(b)(3)

King says Defendants violated 15 U.S.C. § 1639(b)(3) by refusing to modify the terms of the loan although he had a financial emergency. *See* 15 U.S.C. § 1639(b)(3):

> The Board may, if it finds that such action is necessary to permit homeowners to meet bona fide personal financial emergencies, prescribe regulations authorizing the modification or waiver of rights created under this subsection, to the extent and under the circumstances set forth in those regulations.

This section does not create a cause of action for the benefit of a homeowner; it only authorizes regulations by the Board of Governors of the Federal Reserve System. *See* 15 U.S.C. § 1602(b) (defining the term "Board").

King's claim under § 1639(b)(3) is dismissed for failure to state a claim.

#### 2. 15 U.S.C. § 1639(h)

King says Defendants violated 15 U.S.C. § 1639(h) by extending credit to him without considering his ability to repay the debt. *See* 15 U.S.C. § 1639(h):

> A creditor shall not engage in a pattern or practice of extending credit to consumers under mortgages referred to in section 1602(aa) of this title based on the consumers' collateral without regard to the consumers' repayment ability, including [*6] the consumers' current and expected income, current obligations, and employment.

The mortgages referred to in section 1602(aa) do not include residential mortgage transactions. *See* 15 U.S.C. § 1602(aa)(1) ("A mortgage referred to in this subsection means a consumer credit transaction that is secured by the consumer's principal dwelling, other than a residential mortgage transaction[.]"). A "residential mortgage transaction" is defined as:

> a transaction in which a mortgage, deed of trust, purchase money security interest arising under an installment sales contract, or equivalent consensual security interest is created or retained against the consumer's dwelling to finance the acquisition or initial construction of such dwelling.

15 U.S.C. § 1602(w).

King does not allege a plausible claim that Defendants violated § 1639(h). As a "residential mortgage transaction" used by King to finance the acquisition of his home, King's mortgage does not qualify as a HOEPA loan.

**C. Predatory Lending (Count III)**

Michigan does not recognize a claim of "predatory lending." *See* *Saleh v. Home Loan Services, Inc.*, 2009 U.S. Dist. LEXIS 72399, 2009 WL 2496682 at *2 n.1 (E.D. Mich. Aug. 17, 2009); *see also* *Beydoun v. Countrywide Home Loans, Inc.*, 2009 U.S. Dist. LEXIS 53309, 2009 WL 1803198 at *4 (E.D. Mich. June 23, 2009) [*7] (assuming plaintiff brought his claim under TILA or HOEPA because Michigan does not have a statute called "Predatory Lending.").

King's predatory lending claim is dismissed for failure to state a claim.

**D. Violation of TILA, 15 U.S.C. § 1601 et seq. (Count IV)**

TILA was enacted to "assure a meaningful disclosure of credit terms so that the consumer will be able to . . . avoid the uninformed use of credit[.]". 15 U.S.C. § 1601(a). TILA is to be liberally construed in the consumer's favor. *Inge v. Rock Fin. Corp.*, 281 F.3d 613, 621 (6th Cir. 2002) (citations omitted).

King says Defendants violated TILA by failing to provide him the requisite disclosure statements, his correct interest rate, and the payment schedule. King says he did not discover Defendants' TILA violation until May 17, 2009 (the eve of the lawsuit).

Pursuant to 15 U.S.C. § 1640(e), TILA actions for damages may be brought within one year from the date of the occurrence of the violation. *See* *McCoy v. Harriman Util. Bd.*, 790 F.2d 493, 496 (6th Cir. 1986). Under 15 U.S.C. § 1635(f), if the required disclosures are not made, actions for rescission expire three years after the transaction is completed. *Id.*

Because King filed his [*8] lawsuit within three years of obtaining the mortgage loan, his action for rescission is timely.

However, King's request for damages under TILA is untimely; he obtained the mortgage loan in December 2007 and did not file a lawsuit until May 18, 2009. But the Sixth Circuit provides for equitable tolling of that statute of limitations under certain circumstances:

> the statute of limitations for actions brought under 15 U.S.C. § 1640(e) is subject to equitable tolling in appropriate circumstances, and that for application of the doctrine of fraudulent concealment, the limitations period runs from the date on which the borrower discovers or had reasonable opportunity to discover the fraud involving the complained of TILA violation.

*Jones v. TransOhio Sav. Ass'n*, 747 F.2d 1037, 1043 (6th Cir. 1984). To toll the limitations period on the basis of fraudulent concealment, Fed. R. Civ. P. 9(b) requires King to plead three elements with particularity: (1) wrongful concealment of Defendants' actions; (2) King's failure to discover the operative facts that are the basis of his cause of action within the limitations period; and (3) King's due diligence until discovery of the facts. *See* *Dayco Corp. v. Goodyear Tire & Rubber Co.*, 523 F.2d 389, 394 (6th Cir. 1975) [*9] (citing *Weinberger v. Retail Credit Co.*, 498 F.2d 552 (4th Cir. 1974)).

Construing King's Complaint liberally in his favor and accepting as true all factual allegations, *See* *Gazette*, 41 F.3d at 1064, King alleges facts that could plausibly entitle him to relief. The Court denies Defendants' motion to dismiss King's claim under 15 U.S.C. § 1601 *et seq.*, and grants King's request to amend his Complaint.

King has 30 days to file an amended complaint. The amended complaint must include the specific TILA provision or regulation that Defendants allegedly violated. If King intends to continue with his request for damages, he must plead his TILA claims with more particularity in compliance with Fed. R. Civ. P. 9(b).

**E. Fraud Claims**

Fed. R. Civ. P. 9(b) says:

> In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake. Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally.

The Sixth Circuit holds that Rule 9(b) must be read liberally. *See* *Coffey v. Foamex L.P.*, 2 F.3d 157, 161 (6th Cir. 1993). However, at a minimum, the plaintiff must "allege the time, place, and content of the alleged misrepresentation [*10] on which he or she relied; the fraudulent scheme; the fraudulent intent of the defendants; and the injury resulting from the fraud." *Id.* at 161-62 (citations omitted). "[A]llegations of

fraudulent misrepresentation must be made with sufficient particularity and with a sufficient factual basis to support an inference that they were knowingly made." *Id.* at 162 (citation omitted). Where there are multiple defendants, a claim must identify who made the alleged misrepresentations. *See* *Hoover v. Langston Equip. Assoc., Inc.*, 958 F.2d 742, 745 (6th Cir. 1992).

A pleading that fails to comply with the requirements of Rule 9(b) fails to state a claim under Rule 12(b)(6). *Michigan ex rel. Kelley v. McDonald Dairy Co.*, 905 F.Supp. 447, 450 (W.D. Mich.1995). However, in the absence of Defendants' motion for a more definite statement, dismissal for failure to satisfy Rule 9(b) is not appropriate. *See* *Coffey*, 2 F.3d at 162 (citing *Hayduk v. Lanna*, 775 F.2d 441, 445 (1st Cir. 1985) (in meeting [the] Rule 9(b) particularity requirement, "federal courts must be liberal in allowing parties to amend their complaints.")).

**1. Fraud in the Inducement (Count V)**

King abandoned his fraudulent misrepresentation [*11] claim for a claim of fraud in the inducement. *See* Plaintiff's Response, p. 12 ("Plaintiff's claim is in the nature of fraud in the inducement, rather than of generic fraud.").

Michigan recognizes fraud in the inducement, which occurs "where a party materially misrepresents future conduct under circumstances in which the assertions may reasonably be expected to be relied upon and are relied upon." *Samuel D. Begola Services, Inc. v. Wild Bros.*, 210 Mich. App. 636, 639, 534 N.W.2d 217 (1995) (citations omitted).

To establish fraud in the inducement, King must prove six elements:

> (1) Defendants made a material representation;
>
> (2) the representation was false;
>
> (3) when Defendants made the representation, they knew it was false, or made it recklessly, without knowledge of its truth and as a positive assertion;
>
> (4) Defendants made the representation with the intention that King would act upon it;
>
> (5) King acted in reliance upon it; and
>
> (6) King suffered damage.

*See* *Belle Isle Grill Corp. v. Detroit*, 256 Mich. App. 463, 477, 666 N.W.2d 271 (2003) (citations omitted).

The only representation about future conduct King says Defendants made was that he could sell the Property or refinance the loans in two years, if he had trouble paying [*12] the monthly loan payments. King says this representation induced him to sign the mortgage loan, and he suffered damages as a result.

While King's claim is plausible, his Complaint does not satisfy the requirements of Fed. R. Civ. P. 9(b).

King has 30 days to file an amended complaint. The amended complaint must include: (1) the name of the individual(s) who made the representation (or the name of their employer); (2) where the representation was made; (3) the content of the representation; (4) the fraudulent scheme; (5) the fraudulent intent of the individual(s) who made the representation; and (6) the injury King suffered as a result of the representation.

**2. Violation of the MBLSLA, MCLA § 445.1672(b) (Count X)**

Under MCLA § 445.1672(b): "It is a violation of this act for a licensee or registrant to . . . [e]ngage in fraud, deceit, or material misrepresentation in connection with any transaction governed by this act."

King says Defendants violated MBLSLA by misrepresenting: (1) the interest rate; (2) his monthly income; (3) the value of the Property; (4) the monthly payment amount; and (5) the idea that he could sell the Property or refinance the loans in two years, if he had trouble paying [*13] the monthly loan payments.

The Loan Application says (a) King represents that the information provided in the application is true and correct (i.e., his monthly income); and (b) neither the Lender nor its agents, brokers, insurers, servicers, successors or assigns made any representation to King regarding the value of the Property.

However, King argues that the broker prepared the document and told him the financial information he provided was converted to the Loan Application. According to King, he was unaware that his monthly income was inaccurate. Further, King says he does not know what information was in the Loan Application because he was coerced into signing it.

King's MBLSLA claim is plausible; the Court cannot dismiss it at this juncture. Nonetheless, King's claim does not comply with Fed. R. Civ. P. 9(b).

King has 30 days to file an amended complaint. The amended complaint must include: (1) the name of the individual(s) who made the representations (or the name of their employer); (2) where the representations were

made; (3) the content of the representations; (4) the fraudulent scheme; (5) the fraudulent intent of the individual(s) who made the representations; and (6) the injury [*14] King suffered as a result of the representations.

**F. Negligent Misrepresentation (Count VI)**

To establish negligent misrepresentation, King must prove six elements:

> (1) a material misrepresentation by Defendants;
>
> (2) the representation was unintentionally false;
>
> (3) the representation was made in connection with the contract's formation;
>
> (4) Defendants and King were in privity of contract;
>
> (5) resulting damages to King; and
>
> (6) King's damages inured to Defendants' benefits.

*Sipes v. Kinetra, L.L.C.*, 137 F.Supp.2d 901, 910 (E.D. Mich. 2001) (citing *M&D, Inc. v. W.B. McConkey*, 231 Mich. App. 22, 585 N.W.2d 33 (1998)). In addition, King must prove he "justifiably relied to his detriment on information prepared without reasonable care by one who owed [him] a duty of care." *Law Offices of Lawrence J. Stockler v. Rose*, 174 Mich. App. 14, 30, 436 N.W.2d 70 (1989) (citing *Raritan River Steel Co. v. Cherry, Bekaert & Holland*, 322 N.C. 200, 367 S.E.2d 609 (1988)).

King's claim against Bank of America fails; a lender does not owe a duty of care to a loan applicant. *See Noel v. Fleet Fin., Inc.*, 971 F.Supp. 1102, 1115 (E.D. Mich. 1997).

King's claim against BAC fails on the fourth element; King and BAC do not have a contractual relationship.

**G. Violation** [*15] **of the FCRA (Count VII)**

King says Defendants either made or will make false reports to credit reporting agencies and he will suffer (or has suffered) damages to his credit rating, name, fame, and reputation in the community.

King concedes this claim. *See* Plaintiff's Response, p. 14 ("If the Defendants have not made negative reports to credit agencies then there is no issue with these claims.").

More importantly, King's claim under FCRA fails because his allegations do not permit the Court to infer more than the mere possibility of misconduct. *See Ashcroft*, 129 S.Ct. at 1950.

**H. Violation of Michigan's Usury Act, MCLA § 438.31 (Count XI)**

King says Defendants added additional fees to the mortgage loan, making the interest rate usurious.

MCLA § 438.31 generally prohibits lenders from charging interest rates that exceed 7% per annum. However, King does not dispute Defendants' position that the exception to the general rule applies. *See* MCLA § 438.31c(2):

> The parties to a note . . . executed after August 11, 1969, the bona fide primary security for which is a first lien against real property . . . may agree in writing for the payment of any rate of interest.

Further, King's Complaint fails to state [*16] a claim because it only asserts legal conclusions. *See DeLorean*, 991 F.2d at 1240.

King's claim under Michigan's Usury Act is dismissed.

**V. CONCLUSION**

Defendants' motion is **GRANTED IN PART AND DENIED IN PART**. The Court **DISMISSES** six of King's claims:

(1) accounting (count I);

(2) HOEPA violations (count II);

(3) predatory lending (count III);

(4) negligent misrepresentation (count VI);

(5) FCRA violation (count VII); and

(6) Michigan's Usury Act (count XI).

Three of King's claims proceed to trial:

(1) TILA violation (count IV);

(2) fraud in the inducement (count V); and

(3) MBLSLA violation (count X).

King must file an amended complaint consistent with this Order.

The hearing on this motion is cancelled. *See* L.R. 7.1(e)(2). The Scheduling Conference will be held on **Monday, September 21, 2009 at 11:00 a.m**.

**IT IS ORDERED**.

/s/ Victoria A. Roberts

Victoria A. Roberts

United States District Judge

Dated: September 11, 2009